No. _____

In the Supreme Court of the United States

FRANCIS V. LORENZO,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The antifraud provisions of the federal securities laws prohibit two well-defined categories of misconduct. One category is the use of *fraudulent statements* in connection with the offer and sale of securities. The other category is employing *fraudulent schemes* in connection with the offer and sale of securities. In *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), this Court considered the elements of a fraudulent statement claim and held that only the "maker" of a fraudulent statement may be held liable for that misstatement under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5(b).

The question presented is whether a misstatement claim that does not meet the elements set forth in *Janus* can be repackaged and pursued as a fraudulent scheme claim. The Circuits have split 3-2 on this question. The Second, Eighth and Ninth Circuits have held that a misstatement alone cannot be the basis of a fraudulent scheme claim, while the DC Circuit and the Eleventh Circuit have held that a misstatement standing alone can be the basis of a fraudulent scheme claim.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT 4

REASONS TO GRANT THE PETITION 13

A. There is a Split Among the Courts of Appeals On Whether Inadequate Claims for Misstatements Can be Repackaged as Claims for Fraudulent Schemes 13

1. The *Janus* Decision Sets Forth a Clear Bright Line Test for Misstatement Liability Under the Federal Securities Laws 15

2. The Majority View is that Inadequate False Statement Claims Cannot be Repackaged as Fraudulent Scheme Claims 17

3. The Minority View is that False Statements Standing Alone Can Be the Basis for Fraudulent Scheme Claims 20

B. This Case Presents an Ideal Vehicle For Resolving A Recurring Legal Issue of Unquestionable Importance to the Fair and Uniform Enforcement of the Federal Securities Laws 21

C. The DC Circuit's Decision is Wrong 23

1. Mere Misstatements Standing Alone Cannot Be The Basis of Fraudulent Scheme Claims Under the Federal Securities Laws 24

2. The DC Circuit's Decision Erases the Distinction between Primary and Secondary Liability Under the Federal Securities Laws and Greatly Expands the Number of Defendants Who Qualify as Primary Violators 25

3. The DC Circuit's Holding Eviscerates this Court's Bright Line Holding in *Janus* by Permitting Plaintiffs To Repackage Misstatement Claims That Do Not Meet the *Janus* Requirements as Fraudulent Scheme Clams 28

4. The DC Circuit Erroneously Held that Lorenzo's Ministerial Acts in Forwarding An Email to Two People Provided a Basis for Fraudulent Scheme Liability 30

CONCLUSION 32

APPENDIX

Appendix A Opinion and Dissenting Opinion of the United States Court of Appeals for the District of Columbia Circuit (September 29, 2017) ..... App. 1

Appendix B Opinion and Order Sustaining Disciplinary Action of the Securities and Exchange Commission (April 29, 2015) ..... App. 51

Appendix C Initial Decision of the Securities and Exchange Commission (December 31, 2013) ..... App. 98

TABLE OF AUTHORITIES

CASES

Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 568 U.S. 455 (2013) 4

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) ..... *passim*

Desai v. Deutsche Bank Sec., Ltd., 573 F.3d 931 (9th Cir. 2009) 5, 18, 19, 24

Flannery v. SEC, 810 F.3d 1 (1st Cir. 2012) 23

Global Crossing Ltd. Sec. Litig., 322 F. Supp. 2d 319 (S.D.N.Y. 2004) 26

Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135 (2011) ..... *passim*

Lautenberg Found. v. Madoff, 2009 WL 2928913 (D.N.J. Sept. 9, 2009) 22

Lentell v. Merrill Lynch & Co., 396 F. 3d 161 (2d Cir. 2005) 17, 29, 31

In re DVI, Inc. Sec. Litig., 639 F.3d 623 (3d Cir. 2011) 4, 20

In re Lernout & Hauspie Sec. Litig., 230 F. Supp. 2d 152 (D. Mass. 2002) 27

In re Nat'l Century Fin. Enters., Inc. Inv. Litig., 2006 WL 469468 (S.D.Ohio Feb. 27, 2006) 19

In re Parmalat Sec. Litig., 376 F. Supp. 2d 472 (S.D.N.Y 2005) 29

In the Matter of John P. Flannery and James D. Hopkins (Exchange Act Release No. 73840, 2014 WL 7145625 (Dec. 15, 2014) 23

Public Pension Fund Group v. KV Pharmaceutical Co., 679 F.3d 972 (8th Cir. 2012) 19, 20

Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) 15

SEC v. Benger, 931 F. Supp. 2d 904 (N.D. Ill. 2013) 22, 30

SEC v. Big Apple Consulting USA, Inc., 783 F.3d 786 (11th Cir. 2015) 20

SEC v. Familant, 910 F. Supp. 2d 83 (D.D.C. 2012) 23

SEC v. KPMG LLP, 412 F.Supp.2d 349 (S.D.N.Y. 2006) 30, 31

SEC v. Kelly, 817 F. Supp. 2d 340 (S.D.N.Y. 2011) 16, 17, 29, 31

SEC v. Lucent Techs., 610 F.Supp.2d 342 (D.N.J. 2009) 31

SEC v. Monterosso, 756 F.3d 1326 (11th Cir. 2014) 20

SEC v. Perry, 2012 WL 1959566 (C.D. Cal. May 31, 2012) ... 16

SEC v. PIMCO Advisors Fund Mgmt. LLC, 341 F.Supp.2d 454 (S.D.N.Y. 2004) 31

SEC v. Pentagon Capital Management PLC, 725 F.3d 279 (2d Cir. 2013) 15

Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008) 27

WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc., 655 F.3d 1039 (9th Cir. 2011) 18, 19

STATUTES AND REGULATIONS

15 U.S.C. § 77q(a) ..... *passim*

15 U.S.C. § 78j ..... *passim*

15 U.S.C. § 78t(e) 27, 28

28 U.S.C. § 1254(1) 1

17 C.F.R. § 240.10b-5 ..... *passim*

PETITION FOR A WRIT OF CERTIORARI

Petitioner Francis V. Lorenzo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The DC Circuit's opinion and Judge Kavanaugh's dissent (Pet. App. 1-50) are reported at 872 F.3d 578 (DC Cir. 2017). The opinion and order of the Securities and Exchange Commission ("SEC") (Pet. App. 51-95) are available at Exchange Act Release No. 74836, 111 S.E.C. Docket 1761 (2015 WL 1927763). The relevant initial decision of the SEC administrative law judge (Pet. App. 96-121) is available at 107 S.E.C. Docket 5934 (SEC Initial Decision Release No. 544, 2013 WL 6858820).

JURISDICTION

The judgment of the Court of Appeals was entered on September 15, 2017. (Pet. App. 1-50). On December 19, 2017, Chief Justice Roberts granted the Petitioner's request to extend the time to file this writ of certiorari to and including January 26, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a)

Fraudulent interstate transactions

(a) USE OF INTERSTATE COMMERCE FOR PURPOSE OF FRAUD OR DECEIT It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) [1] of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j

Manipulative and deceptive devices
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality

of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SEC Rule 10b-5, 17 CFR 240.10b-5

Employment of manipulative and deceptive devices.
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

STATEMENT

1. The antifraud provisions of the federal securities laws prohibit two well-defined categories of misconduct in connection with the offer and sale of securities. One category is the use of *fraudulent statements* in connection with the offer and sale of securities; the other category is employing *fraudulent schemes*. With regard to fraudulent statements, Section 17(a)(2) of the Securities Act of 1933 (the "Securities Act") establishes liability for misstatements and proscribes obtaining money or property by means of any untrue statement or omission of a material fact. Likewise, Section 10(b) of the Securities and Exchange Act of 1934 (the "Exchange Act") and SEC Rule 10b-5(b) thereunder prohibit making any "untrue statement of a material fact. . ."

With regard to *fraudulent schemes*, Section 17(a)(1) of the Securities Act prohibits anyone from employing any "device, scheme, or artifice to defraud" in the offer or sale of securities. Likewise, Section 10(b) of the Exchange Act and SEC Rule 10b-5(a) prohibit anyone from employing "any device, scheme, or artifice to defraud" in connection with the purchase or sale of securities and Rule 10b-5(c) prohibits anyone from engaging in "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. . ." in connection with the purchase or sale of securities. Claims brought under Rules 10b-5(a) and (c) are generally referred to as "scheme liability" claims. *See, e.g., In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 643 n.29 (3d Cir. 2011), *abrogated on other grounds by Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455 (2013)("We refer to

claims under Rule 10b-5(a) and (c) as 'scheme liability claims', because they make deceptive conduct actionable, as opposed to Rule 10b-5(b), which relates to deceptive statements.")

The DC Circuit's opinion in this matter "creates a circuit split[1] by holding that mere misstatements, standing alone, may constitute the basis for so-called scheme liability under the securities laws – that is, willful participation in a scheme to defraud – even if the defendant did not make the misstatements." (Kavanaugh, J., dissenting) (Pet. App. 46). However, claims for fraudulent statements are distinct from claims for fraudulent schemes. *Desai v. Deutsche Bank Sec., Ltd.*, 573 F.3d 931, 939 (9th Cir. 2009). In fact, this Court in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011) carefully set forth the elements that a plaintiff must establish to prove a fraudulent statement claim under the federal securities laws. The DC Circuit's decision below allows the SEC and private plaintiffs to sidestep *Janus*' carefully drawn out elements of a fraudulent statement claim merely by relabeling the claim -- with nothing more -- as a fraudulent scheme claim.

The DC Circuit's decision also erases the important distinction between primary and secondary violators of the securities laws and opens up large numbers of defendants who are secondary actors at best to claims for securities fraud – claims that would otherwise be barred in private litigation under the holding of *Central*

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[1] Judge Kavanaugh's dissenting opinion did not discuss the two Eleventh Circuit cases referenced *infra* at 20 that are in agreement with the DC Circuit, which results in a 3-2 circuit split.

Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994), which eliminated aiding and abetting liability in private securities fraud litigation.

The DC Circuit's decision raises legal questions of national importance both for the SEC's enforcement program and for private securities litigation, including federal securities class actions. The question presented in this petition is critical to the fair and uniform enforcement of the federal securities laws and this case squarely presents the issue that has divided the circuits.

This case merits the Court's review and the Court should resolve the circuit split.

2. In February 2009, Francis V. Lorenzo ("Lorenzo") became the director of investment banking at Charles Vista, LLC ("Charles Vista"). (Pet. App. 3). Charles Vista was a broker-dealer registered with the SEC and owned by Gregg Lorenzo, who is no relation to Francis Lorenzo. (*Ibid.*) One of Charles Vista's clients was Waste2Energy Holdings, Inc. ("W2E"). W2E represented to Charles Vista and to the public that it had developed a valuable "gasification" technology that could generate electricity by converting solid waste into gas. (*Ibid.*) W2E was a public company with various SEC filings publicly available that described its operations and financial condition in detail. (Pet. App 4).

In September 2009, W2E conducted a private offering of $15 million in convertible debentures to select investors. (Pet. App. 3). Debentures are "debt secured only by the debtor's earning power, not by a

lien on any specific asset." BLACK'S LAW DICTIONARY 486 (10th ed. 2014). Charles Vista served as the exclusive placement agent for W2E's debenture offering. (Pet. App. 3-4).

In its most recent SEC filing at the time, the June 3, 2009 Form 8-K (which is used to notify investors of certain specified material events), W2E stated that its intangible assets, including its gasification technology, were worth just over $10 million as of the end of 2008. (Pet. App. 4). On September 9, 2009, W2E prepared a private offering memorandum for potential investors that described the offering, the debentures and W2E's financial condition. (*Ibid.*)

W2E's gasification technology never materialized and on October 1, 2009, after a lengthy audit, W2E filed an amended Form 8-K, in which it reported a total "impairment" of its intangible assets, because management made a determination that the company's assets were of no value. (Pet. App. 3-4). W2E reduced the value of its gasification technology to zero and its total assets to $370,552 as of March 31, 2009. (Pet. App. 4). On the same day that it filed its amended Form 8-K, October 1, 2009, W2E also filed a quarterly Form 10-Q with the SEC, in which it valued its total assets at $660,408 as of June 30, 2009. (*Ibid.*)

Later on October 1, 2009, Lorenzo's secretary alerted him by email that W2E had filed an amended Form 8-K. (Pet. App. 4). The next day, Lorenzo emailed links to both of W2E's October 1 filings to all Charles Vista brokers. (*Ibid.*) There is no evidence that Lorenzo read the two SEC filings in detail or that he was aware that W2E had written down the value of its assets.

On October 14, 2009, Lorenzo separately emailed two potential investors "several key points" about W2E's pending debenture offering. (Pet. App. 5). His emails omitted any mention of the devaluation of W2E's intangible assets. Lorenzo's emails stated to both recipients that the offering came with "3 layers of protection: (I) [W2E] has over $10 mm in confirmed assets; (II) [W2E] has purchase orders and LOI's for over $43 mm in orders; (III) Charles Vista has agreed to raise additional monies to repay these Debenture holders (if necessary)." (*Ibid.*) One of Lorenzo's messages said that it had been sent "[a]t the request of Gregg Lorenzo," and the other stated that it had been sent "[a]t the request of Adam Spero [a broker with Charles Vista] and Gregg Lorenzo." In both messages, Lorenzo stated that the recipients could call him with any questions. He signed both messages with his name and title as "Vice President – Investment Banking." (*Ibid.*)

3. On February 15, 2013, the SEC commenced enforcement proceedings against Lorenzo, Gregg Lorenzo, and Charles Vista. (Pet. App. 5). It charged each with violating three securities-fraud provisions: (i) Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(1); (ii) Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j; and (iii) Securities Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5. Gregg Lorenzo and Charles Vista settled the charges against them, but the claims against Lorenzo concerning the two emails proceeded to an administrative hearing before the SEC. (Pet. App. 5-6).

On September 18 and 19, 2013, an administrative hearing was held before an SEC administrative law

judge, and, on December 31, 2013, an Initial Decision was rendered (Pet. App. 98-121). After hearing Lorenzo's testimony and weighing his credibility, the judge concluded that Lorenzo's boss (Gregg Lorenzo) had "drafted" the emails in question (Pet. App. 106) and that Lorenzo's boss had "asked" Lorenzo to send the emails to the two clients. (Pet. App. 38; 106). The administrative law judge also concluded that Lorenzo did not read the text of the emails and that Lorenzo "sent the emails without even thinking about the contents." (Pet. App. 38; 109). Furthermore, the judge noted that the emails themselves expressly stated that they were being sent at "the request" of Lorenzo's boss. (Pet. App. 39; 107). "Those factual findings were very favorable to Lorenzo and should have cleared Lorenzo of any serious wrongdoing under the securities laws." (Kavanaugh, J., dissenting) (Pet. App. 39).

"Nevertheless, [t]he judge somehow concluded that those findings of fact demonstrated that Lorenzo willfully violated the securities laws – meaning that Lorenzo acted with an intent to deceive, manipulate, or defraud." (Kavanaugh, J dissenting) (Pet. App. 39). As a sanction, the judge: (i) ordered Lorenzo to cease and desist from violating each securities-fraud provision giving rise to the charges against him; (ii) imposed against Lorenzo a lifetime bar from the securities industry; and (iii) imposed a civil monetary penalty of $15,000. (Pet. App 39; 119; 120).

However,

> the administrative law judge's factual findings and legal conclusions do not square up. If Lorenzo did not draft the emails, did not think about the contents of the emails, and sent the

> emails only at the behest of his boss, it is impossible to find that Lorenzo acted 'willfully'. That is Mens Rea 101. Establishing that a defendant acted willfully in this context requires proof at least of the defendant's 'intent to deceive, manipulate, or defraud.' *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008) (internal quotation marks omitted). (Kavanaugh, J., dissenting) (Pet. App. 39).

4. Lorenzo petitioned the Commission for review of the Initial Decision and argued that the administrative law judge's factual findings did not support the judge's legal conclusions and sanctions. The Commission came to the same conclusion. "But instead of vacating the order against Lorenzo, the Commission did something quite different and quite remarkable. In a Houdini-like move, the Commission rewrote the administrative law judge's factual findings to make those factual findings correspond to the legal conclusion that Lorenzo was guilty and deserving of a lifetime suspension." (Kavanaugh, J., dissenting) (Pet. App. 41).

> Without hearing from Lorenzo or any other witnesses, the Commission simply swept the judge's factual and credibility findings under the rug. The Commission concluded that Lorenzo himself was 'responsible' for the emails' contents. . . Faced with inconvenient factual findings that would make it hard to uphold the sanctions against Lorenzo, the Commission – without hearing any testimony – simply manufactured a new assessment of Lorenzo's credibility and rewrote the judge's factual

findings. (Kavanaugh, J., dissenting) (Pet. App. 41-42).

On April 29, 2015, the Commission issued an Opinion sustaining the Initial Decision's conclusion that the two emails in question violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5(a), (b) and (c) thereunder. The Commission Opinion also imposed on Lorenzo a cease-and-desist order, a lifetime bar from the securities industry and a civil monetary penalty of $15,000. (Pet. App. 51-97). The Commission denied Lorenzo's motion for reconsideration on June 3, 2015. (Pet. App. 6). The appeal to the DC Circuit followed.

5. On September 15, 2017, the DC Circuit overturned the Commission's finding that Lorenzo violated Rule 10b-5(b) on the grounds that Lorenzo did not make the misstatements at issue and vacated the Commission's sanctions. (Pet. App. 1-37). However, the DC Circuit in a 2-1 decision upheld the Commission's findings that Lorenzo violated Section 17(a)(1) of the Securities Act, Section 10(b) of the Securities Exchange Act, and Rule 10b-5(a) and (c). (Pet. App. 25). Judge Kavanaugh issued a dissenting opinion that sharply disagreed with the majority's holding that Lorenzo violated any of those securities fraud provisions. In particular, Judge Kavanaugh criticized the majority's deference to the Commission's finding that Lorenzo acted with scienter. "How could Lorenzo have intentionally deceived the clients when he did not draft the emails, did not think about the contents of the emails, and sent the emails only at his boss's direction?" (Kavanaugh, J., dissenting) (Pet. App. 39-40)

Judge Kavanaugh was also highly critical of the majority's deference to the Commission's rewriting of the administrative law judge's factual findings. Judge Kavanaugh stated

> Lorenzo was the only relevant witness at trial . . . and given that his credibility was central to the case, the SEC had no reasonable basis to run roughshod over the administrative law judge's findings of fact and credibility assessments. In short, the SEC's rewriting of the findings of fact deserves judicial repudiation, not judicial deference or respect. (Kavanaugh, J., dissenting)(Pet. App. 45)

In fact, Judge Kavanaugh severely criticized the Commission's entire administrative process in the way it handled the enforcement proceedings against Lorenzo. "The administrative law judge's decision in this case contravenes basic due process (Pet. App. 40). . . Lorenzo is entitled to a fair process just like everyone else. He has not received a fair process in this case. (Kavanaugh, J., dissenting)(Pet. App. 40, 49)(citations omitted).

The DC Circuit remanded the case to the Commission for reconsideration of the appropriate penalties to impose on Lorenzo. (Pet. App. 36-37). This Petition for a Writ of Certiorari followed.

REASONS TO GRANT THE PETITION

A. There is a Split Among the Courts of Appeals On Whether Inadequate Claims for Misstatements Can be Repackaged as Claims for Fraudulent Schemes

> The DC Circuit's opinion below creates a circuit split by holding that mere misstatements, standing alone, may constitute the basis for so-called scheme liability under the securities laws – that is, willful participation in a scheme to defraud – even if the defendant did not make the misstatements. No other Court of Appeals has adopted the approach that the majority opinion adopts here. Other courts have instead concluded that scheme liability must be based on conduct that goes beyond a defendant's role in preparing mere misstatements or omissions made by others. (Kavanaugh, J., dissenting) (Pet. App. 46).

The federal securities laws contain a well-established distinction between claims for fraudulent *statements* and claims for fraudulent *conduct*. Rule 10b-5(b), promulgated under Section 10(b) of the Securities Exchange Act of 1934, proscribes making untrue *statements* in connection with the purchase or sale of a security. In contrast, Section 17(a)(1) of the Securities Act and Rule 10b-5(a) and (c) proscribe deceptive *conduct* (such as market manipulation) in connection with the offer, purchase or sale of a security.

While there is some overlap in these antifraud provisions, this Court has set bright line legal standards for claims for false statements under Rule

10b-5(b). Specifically, only a person who "makes" a misstatement can be held liable for that misstatement under Rule 10b-5(b). *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011). Under *Janus*, for purposes of Rule 10b-5

> the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. One who prepares or publishes a statement on behalf of another is not its maker. *Janus*, 564 U.S. at 142.

The DC Circuit correctly held that Lorenzo was not liable under Rule 10b-5(b) for the three misstatements in the two emails, because Lorenzo was not the "maker" of the statements under the standards set by this Court's holding in *Janus*. However, the DC Circuit erroneously held that these same misstatements, which it found Lorenzo did not make, could still be the sole basis of fraudulent scheme liability under Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Rule10b-5(a) and (c).

By so holding, the DC Circuit erroneously adopted the minority side of a now 3-2 circuit split and has eviscerated this Court's holding in *Janus*. The DC Circuit's decision allows both the SEC and private plaintiffs to sidestep the carefully laid out standards for fraudulent statement claims by repackaging the claims -- with nothing more -- as claims for fraudulent schemes.

1. The *Janus* Decision Sets Forth a Clear Bright Line Test for Misstatement Liability Under the Federal Securities Laws.

False statements are exclusively addressed in Section 17(a)(2) of the Securities Act and in SEC Rule 10b-5(b). These provisions prohibit making false statements of material fact in connection with the offer, purchase or sale of a security. In contrast, Section 17(a)(1) and the other two subsections of Rule 10b-5 – (a) and (c) – do not address false statements at all and prohibit distinctly different types of fraud in the category of deceptive schemes, such as market manipulation. This Court has stated that the term "manipulative" is "a term of art when used in connection with securities markets," referring to practices "such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 476 (1977). *See also SEC v. Pentagon Capital Management PLC*, 725 F.3d 279 (2d Cir. 2013)(Pentagon's late trading activity, beyond the communication of the trades themselves, included finding brokers and a clearing system that would allow late trades, as well as the specific coordination—on a daily basis—of the transmission of instructions to buy or sell or refrain from doing. . .In short, Pentagon's fraudulent activities independently satisfy the requirements of scheme liability under Rule 10b–5(a) and (c) and Section 17(a)).

The Court in *Janus* established a bright-line test to determine whether a person can be held liable for false statements under Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder. In *Janus*, this Court

held that a defendant may be liable for false statements under Rule 10b-5(b) only if the defendant was the "maker" of the false statements. *Janus*, 564 U.S. at 142. Specifically, a defendant may be held liable for a false statement only if he is the person or entity with ultimate authority on whether and how to communicate the statement, including its content, and whether and how to communicate it. *Ibid.* The *Janus* decision held that only the "maker" of the statement, but not a person who substantially participates in the creation of the statement, can be held primarily liable under Section 10(b) and Rule 10b-5.

The *Janus* decision reasoned that, without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. The *Janus* decision held that one who prepares or publishes a statement on behalf of another is not its maker and that, in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed. *Janus*, 564 U.S. at 142-43. District courts have extended the *Janus* Court's holding to misstatement claims brought not only under Rule 10b-5(b) but also to misstatement claims brought under Section 17(a) of the Securities Act. *See SEC v. Kelly*, 817 F. Supp. 2d 340, 344 (S.D.N.Y. 2011); *SEC v. Perry*, 2012 WL 1959566, at *8 (C.D. Cal. May 31, 2012).

In this case, the DC Circuit held that, under the standards set forth in *Janus*, Lorenzo was not the maker of the misstatements at issue and therefore was not liable under Rule 10b-5(b). However, the DC Circuit erroneously held that Lorenzo could be liable

for those same misstatements under a theory of scheme liability under Section 17(a)(1) of the Securities Act and Rule 10b-5(a) and (c).

The DC Circuit's holding in this matter is contrary to the view of a majority of circuits that have considered the issue. The majority view is that plaintiffs, including the SEC, cannot repackage Rule 10b-5(b) deceptive statement claims that fail to meet the *Janus* standards as fraudulent scheme claims under Section 17(a)(1) of the Securities Act or Rule 10b-5(a) and (c).

2. The Majority View is that Inadequate False Statement Claims Cannot be Repackaged as Fraudulent Scheme Claims

The Second Circuit was the first circuit to address whether misstatements by themselves could form the basis for claims for fraudulent scheme claims under Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c). In *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005), the Second Circuit held that misstatements alone could not form the basis of fraudulent scheme claims. In *Lentell*, the Second Circuit held that the plaintiffs failed to make out fraudulent scheme claims for market manipulation under Rule 10b-5(a) and (c) when the sole basis for the market manipulation claims were alleged misrepresentations or omissions made by the defendants. *See also SEC v. Kelly*, 817 F. Supp. 2d 340, 343-44 (S.D.N.Y. 2011)(dismissing the SEC's fraudulent scheme claims, because they were premised on a misrepresentation and neither defendant "made" the misstatement as *Janus* requires).

The Ninth Circuit in *Desai v. Deutsche Bank Sec., Ltd.*, 573 F.3d 931, 939 (9th Cir. 2009), has also held that mere misstatements standing alone cannot be the basis of claims for fraudulent schemes.

> We must recognize, however, that manipulative conduct has always been distinct from actionable omissions. Omissions are generally actionable under Rule 10b-5(b)... Manipulative conduct, by contrast, is actionable under Rule 10b-5(a) or (c) and includes activities designed to affect the price of a security artificially by simulating market activity that does not reflect genuine investor demand....If such nondisclosure of a defendant's fraud was an actionable omission, then every manipulative conduct case would become an omissions case. If that were so, then all of the Supreme Court's discussion of what constitutes manipulative activity would be redundant. We decline to read the Supreme Court's case law on manipulative conduct as a little more than an entertaining, but completely superfluous, intellectual exercise. *See Stoneridge*, 128 S.Ct. at 769 (listing the three types of §10(b) actions); *Cent. Bank*, 511 U.S. at 177, 114 S.Ct. 1439 (same)(citations omitted). (*Desai*, 573 F.3d at 939).

The Ninth Circuit has held that, for fraudulent scheme claims to be actionable under Rule 10b-5(a) or (c), something more is required than just deceptive statements. *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039 (9th Cir. 2011). In *WPP* the Ninth Circuit stated that a "defendant may only be liable as part of a fraudulent scheme based

upon misrepresentations and omissions under Rules 10b–5(a) or (c) when *the scheme also encompasses conduct beyond those misrepresentations or omissions.*" (655 F3d at 1057)(emphasis added). In the *WPP* case, the Ninth Circuit also stated that a "theory of recovery that merely repeats the allegations made in support of ... misrepresentation and omission claim" is not a valid claim under Rule 10b–5(a) or (c) 655 F.3d at 1057-58 (*citing In re Nat'l Century Fin. Enters., Inc. Inv. Litig.*, 2006 WL 469468, at *21 (S.D.Ohio Feb. 27, 2006)).

In the *WPP* case, the Ninth Circuit stated that a defendant who uses a "device, scheme, or artifice to defraud" or who engages in "any act, practice, or course of business which operates or would operate as a fraud or deceit" may be liable for securities fraud under Rule 10b-5(a) or (c). By contrast, "[o]missions are generally actionable under Rule 10b–5(b) ... [and] stem from the failure to disclose accurate information relating to the value of a security where one has a duty to disclose it." *WPP*, 655 F.3d at 1057 (*citing Desai*, 573 F.3d at 940). The Ninth Circuit further stated in *WPP* that "[c]ourts have generally held that a Rule 10b–5(a) and/or (c) claim cannot be premised on the alleged misrepresentations or omissions that form the basis of a Rule 10b–5(b) claim." (*WPP*, 655 F.3d at 1057).

The Eighth Circuit is in agreement with the Ninth and Second Circuits in holding that misstatements, standing alone, can never be sufficient to bring a fraudulent scheme claim under Rule 10b-5(a) or (c). In *Public Pension Fund Group v. KV Pharmaceutical Co.*, 679 F.3d 972 (8th Cir. 2012), the Eighth Circuit stated that "[w]e join the Second and Ninth Circuits in recognizing a scheme liability claim must be based on

conduct beyond misrepresentations or omissions actionable under Rule 10b-5(b)." (679 F.3d at 987). In doing so, the Eighth Circuit recognized the important distinction between claims for misstatements and claims for deceptive schemes. "Claims brought under Rules 10b-5(a) and (c) are generally referred to as 'scheme liability' claims." 679 F.3d at 986 (citing *DVI, Inc.*, 639 F.3d 623, 643 n. 29).

3. The Minority View is that False Statements Standing Alone Can Be the Basis for Fraudulent Scheme Claims.

In contrast to this majority rule, the Eleventh Circuit in *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786 (11th Cir. 2015) held that "even a person ... who is not the 'maker' of an untrue statement of material fact, nonetheless could be liable as a primary violator of Rule 10b–5(a) and (c)." (783 F.3d 795-96). The Eleventh Circuit also said in the *Big Apple Consulting* case that "[S]ubsection (b) was the only subsection at issue in *Janus*" (783 F.3d at 796) and that "*Janus* does not extend to claims based on schemes to defraud under Rule 10b–5(a) and (c)." *Ibid.*

In another case, the Eleventh Circuit held that "*Janus* only discussed what it means to 'make' a statement for purposes of Rule 10b–5(b) and did not concern section 17(a)(1) or (3) or Rule 10b–5(a) or (c)." *SEC v. Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014). The Eleventh Circuit further stated in *Monterosso* that "the operative language of section 17(a) does not require a defendant to "make" a statement in order to be liable." (756 F.3d at 1334).

In this case, the DC Circuit joined the Eleventh Circuit's position and created a 3-2 circuit split. The DC Circuit stated that "[w]e know of no blanket reason, however, to treat the various provisions as occupying mutually exclusive territory, such that false-statement cases must reside exclusively within the province of Rule 10b-5(b)." (Pet. App. 25-26).

Respectfully, the minority position is erroneous, and this Court should adopt the view of the majority of the circuits and hold that plaintiffs, including the SEC, cannot sidestep the *Janus* requirements for false statement claims simply by repackaging the claims as fraudulent scheme claims.

B. This Case Presents an Ideal Vehicle For Resolving A Recurring Legal Issue of Unquestionable Importance to the Fair and Uniform Enforcement of the Federal Securities Laws.

The question presented in this petition is critical to the fair and uniform enforcement of the federal securities laws. Moreover, this case is an ideal vehicle to resolve the circuit split. The DC Circuit expressly considered and rejected the holdings of the Second, Eighth and Ninth Circuits. Also, the legal question presented here is unquestionably important. The issue arises frequently in SEC enforcement proceedings and in private securities litigation, including securities class action lawsuits. Private litigation and SEC enforcement actions often involve very significant liability and, in addition, SEC enforcement actions (like the one filed against Lorenzo) often seek to bar individuals from working in their chose profession in the securities industry.

If the Courts of Appeals diverge on whether a defendant who did not make a misstatement can be sued for securities fraud, securities plaintiffs, including the SEC, will migrate to those courts that enable them to ensnare the greatest number of defendants. This is a real risk, because, if Lorenzo had been sued by the SEC in a district court in the State of New York, where he lives, instead of in an SEC administrative proceeding, the SEC's case would have been dismissed under the Second Circuit precedent discussed above. However, because Lorenzo's appeal from the Commission's Order was of necessity to the DC Circuit, he has been found liable of violating Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c) and Section 17(a)(1) of the Securities Act. The SEC routinely has a choice of venue and to prevent the Eleventh and DC Circuits from becoming the forums of choice for the SEC and overbroad private securities lawsuits, this Court should grant review and resolve the 3-2 circuit split.

In addition, the question presented in this Petition will reoccur and likely lead to a deepening of the circuit split. Federal district courts in circuits that have not ruled on the issues raised in this Petition have likewise taken conflicting positions. *Compare Lautenberg Found. v. Madoff*, 2009 WL 2928913, at *12 (D.N.J. Sept. 9, 2009)("[c]ourts have generally held that '[a] Rule 10b–5(a) and/or (c) claim cannot be premised on the alleged misrepresentations or omissions that form the basis of a Rule 10b–5(b) claim'") *with SEC v. Benger*, 931 F. Supp. 2d 904, 905-06 (N.D. Ill. 2013)(misstatements can give rise to liability under the antifraud provisions even if the conduct in question does not amount to "making" a statement under

Janus). *See also SEC v. Familant*, 910 F. Supp. 2d 83, 93-95 (D.D.C. 2012)(holding that misstatements can give rise to liability under the antifraud provisions even if the conduct in question does not amount to "making" a statement under *Janus*).

In addition, the SEC has moved aggressively in its enforcement cases to implement the minority view espoused by the Eleventh Circuit, which allows plaintiffs to pursue misstatement claims as fraudulent scheme claims and thereby sidestep the standards for misstatement claims set forth in this Court's *Janus* decision. *See Opinion of the Commission in In the Matter of John P. Flannery and James D. Hopkins* (Exchange Act Release No. 73840, 2014 WL 7145625 (Dec. 15, 2014), *vacated on other grounds*, *Flannery v. SEC*, 810 F.3d 1 (1st Cir. 2012).

There is also no need for additional percolation. Five circuits, as well as numerous district courts, have considered whether fraudulent statements on their own can form the basis of a fraudulent scheme claim and the arguments on both sides of the split have been fully aired.

C. The DC Circuit's Decision is Wrong

In its opinion below, the DC Circuit ignored the well-established distinction in the federal securities laws between claims for fraudulent statements and claims for fraudulent schemes. The DC Circuit held that Lorenzo was liable for misstatements that he did not make under the provisions of the federal securities laws that proscribe fraudulent schemes. The DC Circuit also erroneously held the Court's holding in *Janus* applied only to Rule 10b-5(b) and not to the

other subsections of Rule 10b-5 or to Section 17(a)(1) of the Securities Act.

1. Mere Misstatements Standing Alone Cannot Be The Basis of Fraudulent Scheme Claims Under the Federal Securities Laws.

As the Ninth Circuit recognized in *Desai*, claims for misstatements have always been distinct from fraudulent scheme claims. *Desai*, 573 F.3d at 940 ("We must recognize, however, that manipulative conduct has always been distinct from actionable omissions"). Section 17(a)(2) of the Securities Act concerns misstatements, while Sections 17(a)(1) and (3) of the Securities Act concern fraudulent schemes. This distinction is also recognized in the structure of Rule 10b-5 itself with its three subsections, two of which concern fraudulent schemes (10b-5 (a) and (c)) and one of which concerns misstatements (10b-5(b)).

The DC Circuit's decision below affirming securities fraud liability against Lorenzo for statements he did not make sweeps away any meaningful distinction between claims for false statements and claims for fraudulent schemes. The DC Circuit's decision also renders meaningless the carefully laid out subsections of Section 17(a) of the Securities Act and Rule 10(b)-5. Under the DC Circuit's approach, all claims for false statements can be brought as fraudulent scheme claims, and, vice-versa, claims for nondisclosure of a defendant's fraudulent conduct become viable claims for misstatements and omissions. (*Desai*, 573 F.3d at 940).

2. The DC Circuit's Decision Erases the Distinction between Primary and Secondary Liability Under the Federal Securities Laws and Greatly Expands the Number of Defendants Who Qualify as Primary Violators.

In *Janus*, this Court narrowed the scope of actors who can qualify as primary defendants in claims for misstatements by holding that only those who "made" a misstatement can be liable for the misstatement. This limitation on the scope of misstatement liability is also important because it directly ties into another important limitation on the scope of liability under the securities laws, which is the inability of private plaintiffs to bring claims against secondary actors for aiding and abetting liability. *Central Bank*, 511 U.S. 164, 191 (1994). In this regard, the *Janus* Court stated:

> For purposes of Rule 10b–5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. . . This rule follows from *Central Bank*, in which we held that Rule 10b–5's private right of action does not include suits against aiders and abettors . . . A broader reading of "make," including persons or entities without ultimate control over the content of a statement, would substantially undermine *Central Bank*. If persons or entities without control over the content of a statement could be considered primary violators who "made" the

> statement, then aiders and abettors would be almost nonexistent. *Janus*, 564 U.S. at 142-43 (internal citations omitted)

The distinction between primary and secondary liability matters, particularly for private securities lawsuits, in which private plaintiffs may not maintain aiding and abetting lawsuits. *Central Bank*, 511 U.S. at 191. Instead of maintaining the important limitations on secondary liability, the DC Circuit has created a backdoor by which private plaintiffs can bring claims of primary violations of the securities laws under a scheme liability theory against large numbers of defendants who would otherwise be secondary actors and immune from suit by private plaintiffs because they did not make the misstatements at issue.

The DC Circuit's decision below allows plaintiffs to sidestep the important limitations *Janus* placed on primary misstatement claims by allowing plaintiffs to pursue inadequate claims against defendants by simply relabeling the misstatement claims as fraudulent scheme claims. To allow a private plaintiff to use a fraudulent scheme theory to pursue primary liability against a defendant who did not make a misstatement would erase the distinction between primary and secondary liability. This, in turn, would allow private plaintiffs to bring claims against defendants that would otherwise be barred as aiding and abetting claims. *See Global Crossing Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 337 n.17 (S.D.N.Y. 2004) (Subsections (a) and (c) may only be used to state a claim . . . for the underlying deceptive devices or frauds themselves, and not as a short cut to circumvent *Central Bank's* limitations on liability for a secondary actor's involvement in making

misleading statements. (*quoting In re Lernout & Hauspie Sec. Litig.*, 230 F. Supp. 2d 152, 175 (D. Mass. 2002))).

The SEC has also aggressively tried to expand the scope of primary liability under the securities laws even though it is empowered by Section 20(e) of the Exchange Act to bring civil actions against aiders and abettors of securities fraud. 15 U.S.C. § 78t(e). Allowing the SEC to repackage inadequate claims for misstatements as fraudulent scheme claims allows the SEC to be able to evade the important statutory distinction between primary liability and secondary (aiding and abetting) liability under Section 20(e) of the Exchange Act. The SEC can do this by charging aiders and abettors with primary liability under a theory of scheme liability.

> For decades, . . .the SEC has tried to erase that distinction [between primary and secondary liability] so as to expand the scope of primary liability under the securities laws. For decades, the Supreme Court has pushed back hard against the SEC's attempts to unilaterally rewrite the law. *See Janus*, 564 U.S. 135; *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.* 552 U.S. 148 (2008); *Central Bank of Denver, NIA. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). Still undeterred in the wake of that body of Supreme Court precedent, the SEC has continued to push the envelope and has tried to circumvent those Supreme Court decisions. *See, e.g., In the Matter of John P. Flannery & James D. Hopkins*, Release No. 3981 (Dec. 15, 2014). This case is

merely the latest example. (Kavanaugh, J., dissenting) (Pet. App. 47).

In this case the SEC could have brought an action under Section 20(e) of the Exchange Act against Lorenzo for aiding and abetting violations of the antifraud provisions by Gregg Lorenzo, who was Francis Lorenzo's boss and the maker of the misstatements in the two emails that were sent. While Lorenzo would have factual defenses to an SEC action for aiding and abetting, such a claim would not have raised any of the problematic legal questions that are the subject of this petition.

Nevertheless, the SEC chose not to bring aiding and abetting claims against Lorenzo and instead improperly pursued primary liability claims under a theory of scheme liability. By doing so the SEC chose to evade the important limitations that this Court has placed on securities fraud liability in *Janus* and *Central Bank*. This Court should not permit the SEC to evade the carefully laid out elements of misstatement claims and statutory aiding and abetting claims.

3. The DC Circuit's Holding Eviscerates this Court's Bright Line Holding in *Janus* by Permitting Plaintiffs To Repackage Misstatement Claims That Do Not Meet the *Janus* Requirements as Fraudulent Scheme Claims.

The DC Circuit's opinion allows the SEC to sidestep the standards that this Court set for misstatement claims in *Janus*. Under the DC Circuit's decision below the SEC may bring inadequate fraudulent

statement claims merely by relabeling them as fraudulent scheme claims. This result renders *Janus* meaningless. (*See Kelly*, 817 F.Supp.2d at 344)("Where the primary purpose and effect of a purported scheme is to make a public misrepresentation or omission, courts have routinely rejected the SEC's attempt to bypass the elements necessary to impose 'misstatement' liability under subsection (b) by labeling the alleged misconduct a 'scheme' rather than a 'misstatement.'") Moreover, if a plaintiff were permitted to pursue a claim for scheme liability against a defendant who did not have the ultimate authority over the content and dissemination of an allegedly false statement, then the *Janus* holding would be rendered meaningless, which is a result that this Court would not support.

As discussed above, the Second, Ninth and Eighth Circuits have all held that to have a viable fraudulent scheme claim a plaintiff must prove that the defendant committed an inherently deceptive or manipulative act that is independent from any alleged misstatement. This prevents plaintiffs from having a backdoor into liability against defendants who did not make the misstatements at issue. *See Lentell v. Merrill Lynch & Co.*, 396 F. 3d 161, 177 (2d Cir. 2005) (rejecting scheme liability where the sole basis for such claims is alleged misrepresentations or omissions); *see also PIMCO*, 341 F. Supp. 2d at 468-69 (rejecting scheme liability for market timing, because the fraud arose only from misleading disclosures). "Subsections (a) and (c) are not a backdoor into liability for those who help others make a false statement or omission in violation of subsection (b) of Rule 10b-5." *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 503 (S.D.N.Y 2005). "Because the

core misconduct alleged is in fact a misstatement, it would be improper to impose primary liability . . . by designating the alleged fraud a manipulative device rather than a misstatement." *SEC v. KPMG LLP*, 412 F.Supp.2d 349, 378 (S.D.N.Y. 2006); *SEC v. Benger*, No. 09 C 676, 2013 WL 1150587, at *5 (N.D. Ill. Mar. 21, 2013)(*Janus* cannot be skirted simply by artful pleading and rechristening a 10b-5(b) claim as a claim under 10b-5(a) and (c)).

4. The DC Circuit Erroneously Held that Lorenzo's Ministerial Acts in Forwarding An Email to Two People Provided a Basis for Fraudulent Scheme Liability.

The DC Circuit erroneously held that Lorenzo's conduct in transmitting the two emails in question was an independent ground for finding that he violated the securities laws' prohibitions against fraudulent schemes regardless of whether he made the statements in question. The DC Circuit's holding in this regard is erroneous, because Lorenzo's actions in sending emails to two investors were only ministerial, and allowing such conduct to serve as the basis of a fraudulent scheme claim under Section 17(a)(1), Section 10(b) and Rules 10b-5(a) and (c) would again erase any meaningful distinction between proscriptions against misstatements and fraudulent schemes. The DC Circuit's opinion cites no conduct by Lorenzo that is not ministerial in nature.

The reasoning of the DC Circuit in holding that Lorenzo engaged in a fraudulent scheme independent of whether he made the statements in question is unpersuasive. While the Court in *Janus* did not address "scheme liability" under subsections (a) and (c)

of Rule 10b–5, nonetheless, where the primary purpose and effect of a purported scheme is to make a public misrepresentation or omission, courts have routinely rejected the SEC's attempt to bypass the elements necessary to impose "misstatement" liability under subsection (b) by labeling the alleged misconduct a "scheme" rather than a "misstatement." *See, e.g., Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005); *SEC v. Lucent Techs.*, 610 F.Supp.2d 342, 359–61 (D.N.J. 2009); *SEC v. KPMG LLP*, 412 F.Supp.2d 349, 377–78 (S.D.N.Y. 2006); *SEC v. PIMCO Advisors Fund Mgmt. LLC*, 341 F.Supp.2d 454, 467 (S.D.N.Y. 2004).

Permitting primary scheme liability to be imposed on Lorenzo based on statements he did not make would also significantly broaden the categories of defendants who can be targeted for primary liability. All of these newly at-risk defendants would be secondary actors at best. As the court explained in *PIMCO*, to permit scheme liability "to attach to individuals who did no more than facilitate preparation of material misrepresentations or omissions actually communicated by others ... would swallow the bright-line test between primary and secondary liability." 341 F.Supp.2d at 467; *see also Kelly*, 817 F.Supp.2d at 343.

The misconduct that the SEC alleged against Lorenzo involves no more than his facilitation of the distribution of misstatements that were made by others. To allow Lorenzo's ministerial conduct to serve as the basis for scheme liability would render the distinction between claims for misstatements and claims for fraudulent schemes meaningless.

Given the foregoing, allowing the finding that Lorenzo committed securities fraud to stand would be unjust and inconsistent with the carefully laid out structure of the antifraud provisions of the federal securities laws. Allowing the finding of liability to stand would also undermine this Court's holdings in *Janus* concerning the elements of a fraudulent statement claim and in *Central Bank* which addressed the important distinction between primary and secondary actors for purposes of securities fraud liability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 26, 2018

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Opinion and Dissenting Opinion of the United States Court of Appeals for the District of Columbia Circuit (September 29, 2017) ..... App. 1

Appendix B Opinion and Order Sustaining Disciplinary Action of the Securities and Exchange Commission (April 29, 2015) ..... App. 51

Appendix C Initial Decision of the Securities and Exchange Commission (December 31, 2013) ..... App. 98

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1202

[Filed September 29, 2017]

FRANCIS V. LORENZO, PETITIONER	)
	)
V.	)
	)
SECURITIES AND EXCHANGE COMMISSION, RESPONDENT	)

Argued September 15, 2016
Decided September 29, 2017

On Petition for Review of an Order of the Securities & Exchange Commission

Robert G. Heim argued the cause for petitioner. With him on the briefs were *Stephanie Rapp-Tully* and *Steven L. Herrick*.

Martin V. Totaro, Attorney, Securities and Exchange Commission, argued the cause for respondent. On the brief were *Anne K. Small*, General Counsel, *Michael A. Conley*, Solicitor, and *Benjamin L. Schiffrin*, Senior Litigation Counsel.

Before: GRIFFITH, KAVANAUGH, and SRINIVASAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SRINIVASAN.

Dissenting opinion filed by *Circuit Judge* KAVANAUGH.

SRINIVASAN, *Circuit Judge*: The Securities and Exchange Commission found that Francis Lorenzo sent email messages to investors containing misrepresentations about key features of a securities offering. The Commission determined that Lorenzo's conduct violated various securities-fraud provisions. We uphold the Commission's findings that the statements in Lorenzo's emails were false or misleading and that he possessed the requisite intent.

We cannot sustain, however, the Commission's determination that Lorenzo's conduct violated one of the provisions he was found to have infringed: Rule 10b-5(b). That rule bars the making of materially false statements in connection with the purchase or sale of securities. We conclude that Lorenzo did not "make" the false statements at issue for purposes of Rule 10b-5(b) because Lorenzo's boss, and not Lorenzo himself, retained "ultimate authority" over the statements. *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011).

While Lorenzo's boss, and not Lorenzo, thus was the "maker" of the false statements under Rule 10b-5(b), Lorenzo played an active role in perpetrating the fraud by folding the statements into emails he sent directly to investors in his capacity as director of investment banking, and by doing so with an intent to deceive. Lorenzo's conduct therefore infringed the other securities-fraud provisions he was charged with

violating. But because the Commission's choice of sanctions to impose against Lorenzo turned in some measure on its misimpression that his conduct violated Rule 10b-5(b), we set aside the sanctions and remand the matter to enable the Commission to reassess the appropriate penalties.

I.

A.

In February 2009, Francis Lorenzo became the director of investment banking at Charles Vista, LLC. Charles Vista was a registered broker-dealer owned by Gregg Lorenzo, no relation to Francis. (For clarity of reference, we will refer to Francis Lorenzo as "Lorenzo" and will use Gregg Lorenzo's first name when referring to him.)

Charles Vista's biggest client, and Lorenzo's only investment-banking client at the time, was a start-up company named Waste2Energy Holdings, Inc. (W2E). W2E claimed to have developed a "gasification" technology that could generate electricity by converting solid waste to gas. W2E's business model relied on the technology's living up to its potential. If it failed to do so, the great majority of W2E's assets—the "intangibles," in balance-sheet lingo—would have to be written off entirely.

W2E's conversion technology never materialized. In September 2009, W2E sought to escape financial ruin by offering up to $15 million in convertible debentures. (Debentures are "debt secured only by the debtor's earning power, not by a lien on any specific asset." BLACK'S LAW DICTIONARY 486 (10th ed. 2014)). Charles

Vista would serve as the exclusive placement agent for W2E's debenture offering.

W2E's most recent SEC filing at the time, its June 3, 2009 Form 8-K (used to notify investors of certain specified events), contained no indication of any possible devaluation of the company's intangible assets. Rather, the form stated that W2E's intangibles were worth just over $10 million as of the end of 2008. On September 9, 2009, W2E issued a Private Placement Memorandum as a guidebook for potential investors in the debentures. That guidebook, like the June 2009 Form 8-K, included no mention of any devaluation of the company's intangibles.

Following a lengthy audit, however, W2E changed its public tune. On October 1, 2009, the company filed an amended Form 8-K in which it reported a total "impairment" of its intangible assets because "management made a determination that the value of the assets acquired were of no value." J.A. 703. As of March 31, 2009, W2E now clarified, its gasification technology should have been valued at *zero*, and its total assets at only $370,552. On the same day it filed its amended Form 8-K, October 1, 2009, W2E also filed a quarterly Form 10-Q in which it valued its total assets at $660,408 as of June 30, 2009.

Later on October 1, Lorenzo's secretary alerted him (via email) about W2E's amended Form 8-K filing. The next day, Lorenzo emailed all Charles Vista brokers links to both of W2E's October 1 filings. On October 5, he received an email from W2E's Chief Financial Officer explaining the reasons for "[t]he accumulated deficit we have reported." *Id.* at 740. The CFO reiterated that W2E had written off "all of our

intangible assets . . . of about $11 million" due to "our assessment of the value of what those asset[s] are worth today." *Id.*

On October 14, Lorenzo separately emailed two potential investors "several key points" about W2E's pending debenture offering. *Id.* at 794, 796. His emails, however, omitted any mention of the wholesale devaluation of W2E's intangibles. On the contrary, Lorenzo's emails assured both recipients that the offering came with "3 layers of protection: (I) [W2E] has over $10 mm in confirmed assets; (II) [W2E] has purchase orders and LOI's for over $43 mm in orders; (III) Charles Vista has agreed to raise additional monies to repay these Debenture holders (if necessary)." *Id.* One of Lorenzo's messages said it had been sent "[a]t the request of Gregg Lorenzo," *id.* at 796, and the other stated it had been sent "[a]t the request of Adam Spero [a broker with Charles Vista] and Gregg Lorenzo," *id.* at 794. In both messages, Lorenzo urged the recipients to "[p]lease call [him] with any questions." *Id.* at 794, 796. And he signed both messages with his name and title as "Vice President – Investment Banking." *Id.*

B.

On February 15, 2013, the Commission commenced cease-and-desist proceedings against Lorenzo, Gregg Lorenzo, and Charles Vista. It charged each with violating three securities-fraud provisions: (i) Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(1); (ii) Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j; and (iii) Securities Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5. Gregg Lorenzo and Charles Vista settled the charges against

them, but the claims against Lorenzo proceeded to resolution before the agency.

An administrative law judge concluded that Lorenzo had "willfully violated the antifraud provisions of the Securities and Exchange Acts by his material misrepresentations and omissions concerning W2E in the emails." *Gregg C. Lorenzo, Francis V. Lorenzo, and Charles Vista, LLC*, SEC Release No. 544, 107 SEC Docket 5934, 2013 WL 6858820, at *7 (Dec. 31, 2013). The ALJ deemed "[t]he falsity of the representations in the emails . . . staggering" and Lorenzo's mental state with respect to those misstatements at least "reckless." *Id.* As a result, the ALJ ordered Lorenzo to: (i) cease and desist from violating each securities-fraud provision giving rise to the charges against him; (ii) forever refrain from participating in the securities industry in several enumerated respects; and (iii) pay a civil monetary penalty of $15,000. *Id.* at *10.

Lorenzo petitioned the Commission for review. Following "an independent review of the record," the full Commission sustained the ALJ's decision, including her "imposition of an industry-wide bar, a cease-and-desist order, and a $15,000 civil penalty." *Francis V. Lorenzo*, SEC Release No. 9762, 111 SEC Docket 1761, 2015 WL 1927763, at *1 (Apr. 29, 2015) (*Lorenzo*). The Commission found that Lorenzo "knew each of [the emails' key statements] was false and/or misleading when he sent them." *Id.* It concluded that the sanctions were "in the public interest to deter Lorenzo and others in similar positions from committing future violations." *Id.* at *17. The Commission later denied Lorenzo's motion for reconsideration.

Lorenzo filed a timely petition for review in this court. He challenges only the Commission's imposition of an industry-wide bar and a $15,000 civil penalty, not the cease-and-desist order.

II.

We first consider Lorenzo's challenges to the Commission's findings that the relevant statements in his email messages were false or misleading and were made with the requisite mental state. The three pertinent statements are the three "layers of protection" enumerated in both of Lorenzo's October 14, 2009, email messages to potential investors about the debenture offering. Lorenzo challenges the Commission's determination that two of the three statements were false or misleading, and he also challenges the Commission's conclusion that he possessed the requisite intent with respect to all three of the statements.

With regard to his intent, establishing a violation of Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act, or Exchange Act Rule 10b-5 "requires proof of scienter." *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008). That standard in turn requires demonstrating "an intent to deceive, manipulate, or defraud." *Id.* (quoting *SEC v. Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992)). The scienter requirement can be satisfied by a showing of "[e]xtreme recklessness," which exists when "the danger was so obvious that the actor was aware of it and consciously disregarded it." *Id.*

The question whether Lorenzo acted with scienter, like the question whether the statements were false or

misleading, is a question of fact. *Id.* at 639. The Commission's "factual findings are conclusive if supported by substantial evidence." *Seghers v. SEC*, 548 F.3d 129, 132 (D.C. Cir. 2008). Although "[s]ubstantial evidence is more than a mere scintilla," *Kornman v. SEC*, 592 F.3d 173, 184 (D.C. Cir. 2010), we have repeatedly described the standard as a "very deferential" one, *e.g.*, *Siegel v. SEC*, 592 F.3d 147, 155 (D.C. Cir. 2010); *Dolphin & Bradbury*, 512 F.3d at 639; *Nat'l Ass'n of Sec. Dealers v. SEC*, 801 F.2d 1415, 1419 (D.C. Cir. 1986). Applying that standard here, we conclude that the Commission's findings as to falsity and scienter are supported by substantial evidence with regard to each of the three pertinent statements in Lorenzo's emails.

A.

The first of the three statements at issue advised potential investors that the "Company has over $10 mm in confirmed assets." J.A. 794, 796. Lorenzo does not directly dispute the falsity of that statement. Nor could he: by the time Lorenzo sent the October 14, 2009, email messages containing that statement, W2E had entirely written off its intangibles and disclosed that its remaining assets were worth far less than $1 million. And Lorenzo himself testified that W2E "would be lucky to get a million" for its intangibles after they had been marked down. *Id.* at 128.

As to the question of scienter, Lorenzo contends that, when he sent the emails, he held a good-faith belief that W2E had over $10 million in confirmed assets. The Commission concluded otherwise, and its finding of scienter is supported by substantial evidence.

One of Lorenzo's chief duties involved conducting due diligence on his clients, including reviewing their financial statements and public SEC filings. During the relevant time, W2E was Lorenzo's sole investment-banking client. He knew that W2E's financial situation was "horrible from the beginning" and that its gas-conversion technology had not worked as planned. *Id.* at 124. He also knew that he stood to gain seven to nine percent of any funds he raised from the debenture offering.

The record shows that, when Lorenzo viewed W2E's June 2009 Form 8-K, he disbelieved the Form's valuation of the company's intangible assets at $10 million. He agreed that the intangibles were a "dead asset" that would be "hugely discounted," *id.* at 127-28, and that W2E would be "lucky [to] get a million dollars for that asset," *id.* at 128-29. He also thought it significant that the $10 million valuation had not been audited, because without such scrutiny, "there is way too much risk for investors." *Id.* at 126. He acknowledged that he had warned Gregg Lorenzo as early as April 2009 to refrain from collateralizing a debenture offering with W2E's intangibles, because those assets "provided no protection" to investors. *Id.* at 159. Lorenzo understood that, if a default occurred, "clients would not be able to recoup their money based on a liquidation of this asset." *Id.* He instead viewed the debenture offering as a "toxic convertible debt spiral." *Lorenzo*, 2015 WL 1927763, at *5.

Evidence concerning Lorenzo's state of mind can also be gleaned from his actions in helping prepare Charles Vista's Private Placement Memorandum for the debenture offering. On August 26, 2009, he asked

W2E's principals to value the company's intangibles at $10 million in the upcoming Memorandum. He received no response. He broached the subject again on September 1, this time leaving the intangibles' value blank, because he "w[asn't] sure what [it] was worth anymore." J.A. 135, 739. The final Memorandum assigned no concrete value to W2E's intangibles; it instead divulged that the company had experienced "significant operating losses" and did "not expect to be profitable for at least the foreseeable future." *Lorenzo*, 2015 WL 1927763, at *3.

In its October 1 SEC filings, W2E publicly disclosed the wholesale write-off of its intangibles. It did so in a tri-column chart entitled "Goodwill and Technology," and it followed that numerical presentation with a textual explanation for the mark-down. Lorenzo acknowledged that he read the amended Form 8-K on October 1 (although, according to him, "[p]robably not as closely as I should have"). J.A. 140. And he received an email from W2E's CFO on October 5 succinctly contextualizing the massive devaluation of W2E's intangible assets.

The evidence therefore supports concluding that, at least by October 5, Lorenzo knew that W2E's intangibles were valueless. He gave testimony on the issue as follows: "Q. So it is fair to say . . . that on October 5, 200[9], you were aware that the $10 million asset had been written off by [W2E]. Correct? A. Okay. I will agree to that. That's correct. Q. That is a fair statement? A. Yes." *Id.* at 151. That admission is difficult to reconcile with Lorenzo's statement that he "unintentional[ly] miss[ed]" the import of the October 5 email. *Id.* at 148. The Commission justifiably credited

his more inculpatory rendition of events, especially in light of his broader, scienter-related concession: "Q. [D]id you know that those statements were inaccurate and misleading? A. Yes. Q. You knew at the time? A. At the time? I can't sit here and say that I didn't know." *Id.* at 158.

According to the Commission, "[t]hat Lorenzo could have looked at [W2E's] filings, which was his job, and missed what was one of the most pertinent facts in them—the valuation of the company's assets—is either untrue or extreme recklessness." *Lorenzo*, 2015 WL 1927763, at *9. The Commission considered it "at least extremely reckless" for Lorenzo to have sent email messages claiming that W2E had over $10 million in "confirmed" assets, given his "long-standing concern about the legitimacy" of those assets. *Id.* We perceive no basis for setting aside the Commission's conclusions as unsupported by substantial evidence.

In resisting that conclusion, Lorenzo relies in part on a $14 million valuation of W2E's assets in a W2E research report emailed by Charles Vista's Chief Compliance Officer to the firm's brokers on the same day Lorenzo sent his pertinent emails (October 14, 2009). The Commission sensibly reasoned that "the mere fact that, for whatever unknown reason, a compliance officer sent an inaccurate research report internally to the firm's brokers is neither analogous to, nor an excuse for, Lorenzo's knowingly sending misleading emails to prospective investors." *Id.* at *9 n.23.

B.

The second contested statement is the assertion in Lorenzo's emails that "[t]he Company has purchase orders and LOI's for over $43 mm in orders." J.A. 794, 796. He maintains that the Commission erred in deeming that statement false or misleading. He notes that, at one point, Charles Vista did in fact receive a $43 million letter of intent from a potential customer in the Caribbean, and that W2E's CEO "put a lot of confidence" in such letters. *Id.* at 160. But as the Commission rightly notes, the Caribbean letter did not obligate its drafter to do anything, and the transaction proceeded no further. By the time Lorenzo sent his emails on October 14, 2009, W2E had no outstanding purchase orders. Lorenzo's emails nonetheless assured the recipients that W2E had over $43 million in "purchase orders *and* LOI's." The Commission thus was fully justified in finding that statement false or misleading. *See Lorenzo*, 2015 WL 1927763, at *6.

Lorenzo also disputes the Commission's finding of scienter concerning the extent of W2E's anticipated cash flow. Asked whether he knew at the time that the $43 million figure was misleading, Lorenzo testified as follows: "I can't say that with a hundred percent because they did have LOI's for 43 million." J.A. 160. As his other testimony revealed, however, Lorenzo understood that W2E's sole letter of intent was "non-binding," a mere potentiality that the company "hoped would materialize." *Id.* at 162. And by September 2009, he "didn't think that the 43 million LOI was ever going to turn into purchases." *Id.* at 164. Lorenzo testified repeatedly to that effect. *See id.* at 163-64 ("Q. And by September 2009 you didn't think it was ever going to

come through, right? A. . . . That is correct."); *id.* at 164 ("Q. So sometime in September you lost confidence that this 43 million was ever going to happen? A. Yes.").

The clear implication of the statement in Lorenzo's email messages was that W2E anticipated a $43 million influx of capital from past and future orders. Yet the record reveals grave doubts on Lorenzo's part that "$43 mm in orders" (or *any* orders) would actually occur. Substantial evidence therefore supports the Commission's finding of scienter as to that statement.

C.

The third statement at issue is the assertion in Lorenzo's email messages that "Charles Vista has agreed to raise additional monies to repay these Debenture holders (if necessary)." *Id.* at 794, 796. Lorenzo disputes the Commission's conclusion that the statement was false or misleading. He contends that Gregg Lorenzo could have made such an agreement for Charles Vista, had done so on prior occasions for debenture holders, and had allegedly met with additional brokers about raising funds for W2E. The Commission permissibly regarded those assertions as "establish[ing] only the theoretical possibility that Charles Vista could have raised additional money to repay investors, not that it had agreed to do so (as Lorenzo's emails claimed)." *Lorenzo*, 2015 WL 1927763, at *7.

With regard to scienter, Lorenzo observes that the Commission included no specific citations to the record in support of its finding. It is true that, although the Commission quoted the evidentiary record at length, it did not cite the particular page numbers on which

certain arguments and quotations appeared. But we "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 286 (1974)). That standard is readily satisfied here.

Lorenzo allowed, at least in hindsight, that "you can interpret this [statement] as being misleading." J.A. 167. Moreover, according to his own testimony, at the time he sent the emails, he did not believe Charles Vista could raise enough money to repay debenture holders. For instance, he testified that, as of October 2009, "it is accurate to say that Charles Vista would not have the buying power or the resources to properly fund [W2E] in order to repay the debentures." *Id.* at 172. Given Lorenzo's knowledge that Charles Vista could not have repaid debenture holders, the Commission could certainly conclude that Lorenzo believed that no such agreement existed. As a result, substantial evidence supports the Commission's finding that Lorenzo acted with scienter with regard to the assurance to investors that Charles Vista had made such a promise.

III.

The Commission found that Lorenzo's actions in connection with his email messages violated Section (17)(a)(1) of the Securities Act and Section 10(b) of the Exchange Act, as implemented by the Commission's Rule 10b-5. The Rule contains three subsections, and the Commission concluded that Lorenzo had violated all three.

We now consider Lorenzo's argument that he did not "make" the relevant statements within the meaning of the express terms of one of Rule 10b-5's subsections, Rule 10b-5(b). We agree with Lorenzo that, under the Supreme Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), he did not "make" the statements at issue for purposes of Rule 10b-5(b). Even so, we conclude that his status as a non-"maker" of the statements under Rule 10b-5(b) does not vitiate the Commission's conclusion that his actions violated the other subsections of Rule 10b-5, as well as Section 17(a)(1).

A.

Under Rule 10b-5(b), it is unlawful to "make any untrue statement of a material fact . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(b). In *Janus*, the Supreme Court explained what it means to "make" a statement within the meaning of that prohibition:

> For purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. One who prepares or publishes a statement on behalf of another is not its maker.

564 U.S. at 142. "[I]n the ordinary case," the Court continued, "attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed." *Id.* at 142-43.

The *Janus* Court held that an investment adviser that had assisted in preparing a mutual fund's prospectuses did not "make" the statements contained therein, because the adviser lacked "ultimate control" over the statements' content and dissemination. *Id.* at 148. The investment adviser had merely "participate[d] in the drafting of a false statement"—"an undisclosed act preceding the decision of an independent entity to make a public statement." *Id.* at 145. The Court illustrated the operation of its test through the following analogy: "Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said." *Id.* at 143.

Under the *Janus* test, a person cannot have "made" a statement if he lacked ultimate authority over what it said and whether it was said, including if he prepared or published it on behalf of another. In light of that understanding, we find that Lorenzo was not the "maker" of the pertinent statements set out in the email messages he sent to potential investors, even viewing the record in the light most favorable to the Commission.

Lorenzo contends that he sent the email messages at the behest of his boss, Gregg Lorenzo, and that Gregg Lorenzo supplied the content of the false statements, which Lorenzo copied and pasted into the messages before distributing them. As a result, Lorenzo contends, Gregg Lorenzo (and not Lorenzo himself) was the "maker" of the statements under *Janus*. The Commission found otherwise, concluding that Lorenzo "was ultimately responsible for the emails' content and

dissemination." *Lorenzo*, 2015 WL 1927763, at *10. We cannot sustain the Commission's conclusion that Lorenzo had "ultimate authority" over the false statements under *Janus*. 564 U.S. at 142. Gregg Lorenzo, and not Lorenzo, retained ultimate authority.

Voluminous testimony established that Lorenzo transmitted statements devised by Gregg Lorenzo at Gregg Lorenzo's direction. For instance, Lorenzo said: "I cut and paste[d] an e-mail and sent it to [investors]," J.A. 153; "I was asked to send these e-mails out by Gregg Lorenzo," *id.* at 156; and "I cut and pasted and sent it," *id.* at 157. He also stated: "I remember getting—getting the e-mail address from [Gregg Lorenzo] and then cut and past[ed] this—this thing and sent it," *id.* at 199; "[Gregg Lorenzo] gave me the e-mail address, I typed it into the 'to' column and cut and pasted this—the content and sent it out," *id.*; "My boss asked me to send these e-mails out and I sent them out," *id.* at 200; "[I] sent these e-mails out at the request of my superior," *id.* at 208; and "I simply was asked to send the e-mail out," *id.* at 208-09.

In the face of that consistent testimony, the Commission anchored its conclusion almost entirely in the following remark from Lorenzo: "If memory serves me—I think I authored it and then it was approved by Gregg and Mike [Molinaro, Charles Vista's Chief Compliance Officer]." J.A. 155. That assertion, even apart from its equivocation, must be read alongside the rest of Lorenzo's testimony. Immediately before and after uttering that line, Lorenzo explained that "I cut and paste[d] an e-mail and sent it" and "I cut and pasted and sent it." *Id.* at 153, 157. And he consistently testified to the same effect throughout. In that light,

Lorenzo's remark that he "authored" the emails cannot bear the weight given it by the Commission. Rather, the statement is fully consistent with Lorenzo's repeated account that, while he produced the email messages for final distribution from himself to the investors—and in that sense "authored" the messages—he populated the messages with content sent by Gregg Lorenzo.

In the line of testimony on which the Commission relies, moreover, Lorenzo stated that, before he sent the messages, they were "approved" by Gregg Lorenzo. That observation reinforces Gregg Lorenzo's ultimate authority over the substance and distribution of the emails: Gregg Lorenzo asked Lorenzo to send the emails, supplied the central content, and approved the messages for distribution. To be sure, Lorenzo played an active role in perpetrating the fraud by producing the emails containing the false statements and sending them from his account in his capacity as director of investment banking (and doing so with scienter). But under the test set forth in *Janus*, Gregg Lorenzo, and not Lorenzo, was "the maker" of the false statements in the emails. 564 U.S. at 142.

The Commission's remaining observations do not alter our conclusion. For instance, the Commission noted that Lorenzo "put his own name and direct phone number at the end of the emails, and he sent the emails from his own account." *Lorenzo*, 2015 WL 1927763, at *10. That sort of signature line, however, can often exist when one person sends an email that "publishes a statement on behalf of another," with the latter person retaining "ultimate authority over the statement." *Janus*, 564 U.S. at 142.

The Commission also referenced Lorenzo's testimony that "he did not recall ever discussing either of the emails or their subject matter with Gregg Lorenzo." *Lorenzo*, 2015 WL 1927763, at *10. That comment, however, is consistent with the understanding that Lorenzo played a minimal role in devising the emails' false statements. And although the email messages said that the Investment Banking Division—which Lorenzo headed—was "summariz[ing] several key points" about the debenture offering, J.A. 794, 796, the content of those points evidently had been supplied by Gregg Lorenzo. The emails, moreover, began by stating that they were being sent at Gregg Lorenzo's request. Lorenzo testified elsewhere that Gregg Lorenzo had remarked, "I want this [to] come from our investment banking division. Can you send this out for me?" *Id.* at 217.

Under the Supreme Court's decision in *Janus*, in short, Lorenzo cannot be considered to have been "the maker" of the statements in question for purposes of Rule 10b-5(b)—i.e., "the person . . . with ultimate authority" over them. 564 U.S. at 142. That person was Gregg Lorenzo, and not (or not also) Lorenzo.

B.

Lorenzo next argues that, if he was not "the maker" of the false statements at issue within the meaning of Rule 10b-5(b), his conduct necessarily also falls outside the prohibitions of Exchange Act Section 10(b), Rules 10b-5(a) and (c), and Securities Act Section 17(a)(1). The Commission concluded otherwise, incorporating by reference its reasoning in *John P. Flannery & James D. Hopkins*, SEC Release No. 3981, 110 SEC Docket 2463, 2014 WL 7145625 (Dec. 15, 2014), *vacated*, *Flannery v.*

SEC, 810 F.3d 1 (1st Cir. 2015) (rejecting the Commission's key factual determinations on substantial-evidence grounds). The Commission determined that, "[i]ndependently of whether Lorenzo's involvement in the emails amounted to 'making' the misstatements for purposes of Rule 10b-5(b), he knowingly sent materially misleading language from his own email account to prospective investors," thereby violating those other provisions. *Lorenzo*, 2015 WL 1927763, at *11.

We sustain the Commission's conclusion to that effect. At least in the circumstances of this case, in which Lorenzo produced email messages containing false statements and sent them directly to potential investors expressly in his capacity as head of the Investment Banking Division—and did so with scienter—he can be found to have infringed Section 10(b), Rules 10b-5(a) and (c), and Section 17(a)(1), regardless of whether he was the "maker" of the false statements for purposes of Rule 10b-5(b).

1. Rules 10b-5(a) and (c), along with Sections 10(b) and 17(a)(1)—all unlike Rule 10b-5(b)—do not speak in terms of an individual's "making" a false statement. Indeed, "[t]o make any . . . statement" was the critical language construed in *Janus*: what the Court described as the "phrase at issue." 564 U.S. at 142 (alteration in original) (quoting 17 C.F.R. § 240.10b-5(b)). That language appears in Rule 10b-5(b), but not in the other provisions Lorenzo was found to have violated.

In particular, Rule 10b-5(a) prohibits "employ[ing] any device, scheme, or artifice to defraud . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(a). And Rule 10b-5(c) bars

"engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person . . . in connection with the purchase or sale of any security." *Id.* § 240.10b-5(c). Consequently, Rule 10b-5(b) "specifies the making of an untrue statement of a material fact and the omission to state a material fact. The first and third subparagraphs are not so restricted." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152-53 (1972).

Nor are Securities Act Section 17(a)(1) and Exchange Act Section 10(b). Section 17(a)(1) makes it unlawful "to employ any device, scheme, or artifice to defraud" in offering or selling a security. 15 U.S.C. § 77q(a)(1). And Section 10(b) forbids "us[ing] or employ[ing] . . . any manipulative or deceptive device or contrivance" in contravention of rules prescribed by the Commission. 15 U.S.C. § 78j(b).

Here, Lorenzo, acting with scienter (i.e., an intent to deceive or defraud, or extreme recklessness to that effect), produced email messages containing three false statements about a pending offering, sent the messages directly to potential investors, and encouraged them to contact him personally with any questions. Although Lorenzo does not qualify as the "maker" of those statements under *Janus* because he lacked ultimate authority over their content and dissemination, his own active "role in producing and sending the emails constituted employing a deceptive 'device,' 'act,' or 'artifice to defraud' for purposes of liability under Section 10(b), Rule 10b-5(a) and (c), and Section 17(a)(1)." *Lorenzo*, 2015 WL 1927763, at *11.

Lorenzo's conduct fits comfortably within the ordinary understanding of those terms. Indeed, he

presents no argument that his actions fail to satisfy the statutory and regulatory language. He does not examine—or even reference—the text of those provisions in arguing that they should be deemed not to apply to his conduct.

Lorenzo does not contend before us, for instance, that he simply passed along information supplied by Gregg Lorenzo without pausing to think about the truth or falsity of what he was sending to investors. If those were the facts, he might attempt to argue that he cannot be considered to have "employed" any fraudulent device or artifice, or "engaged" in any fraudulent or deceitful act, within the meaning of Rules 10b-5(a) and (c), and of Sections 10(b) and 17(a)(1). But while Lorenzo argued before the Commission that he produced and sent the emails at Gregg Lorenzo's request without giving them thought, the Commission found "implausible" any suggestion that he merely passed along the messages in his own name without thinking about their content. *Lorenzo*, 2015 WL 1927763, at *9. Lorenzo does not challenge that finding here.

We therefore consider the case on the understanding that Lorenzo, having taken stock of the emails' content and having formed the requisite intent to deceive, conveyed materially false information to prospective investors about a pending securities offering backed by the weight of his office as director of investment banking. On that understanding, the language of Sections 10(b) and 17(a)(1), and of Rules 10b-5(a) and (c), readily encompasses Lorenzo's actions.

2. Instead of presenting any argument that his conduct falls outside the language of those provisions,

Lorenzo asserts that, if he could be found to have violated the provisions, the decision in *Janus* would effectively be rendered meaningless. *See SEC v. Kelly*, 817 F. Supp. 2d 340, 344 (S.D.N.Y. 2011). He notes the *Janus* Court's interest in interpreting the term "make" in a manner that would avoid undermining the Court's previous holding that private actions under Rule 10b-5 cannot be premised on conceptions of secondary (i.e., aiding-and-abetting) liability. *See Janus*, 564 U.S. at 143 (discussing *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)).

As the Court explained in *Janus*, whereas the Commission can bring actions under Rule 10b-5 based on an aiding-and-abetting theory, private parties—after *Central Bank*—cannot. *Id.* The *Janus* Court reasoned that a "broader reading of 'make,'" encompassing "persons or entities without ultimate control over the content of a statement," could mean that "aiders and abettors would be almost nonexistent." *Id.* That result, the Court believed, would have undercut an implicit understanding from *Central Bank*: that "there must be some distinction between those who are primarily liable . . . and those who are secondarily liable." *Id.* at 143 n.6. The same considerations, Lorenzo contends, should weigh in favor of concluding that his conduct did not violate Section 10(b), Rules 10b-5(a) and (c), and Section 17(a)(1). We are unpersuaded.

To the extent the *Janus* Court's concerns about aiding-and-abetting liability in private actions under Rule 10b-5(b) should inform our interpretation of those other four provisions, the conduct at issue in *Janus* materially differs from Lorenzo's actions in this case.

Janus involved an investment adviser that initially drafted false statements which an independent entity subsequently decided to disseminate to investors in its own name. The investment adviser's role in originally devising the statements was unknown to the investors who ultimately received them. The Court thus described the investment adviser's conduct as "an undisclosed act preceding the decision of an independent entity to make a public statement." 564 U.S. at 145.

In this case, by contrast, Lorenzo's role was not "undisclosed" to investors. The recipients were fully alerted to his involvement: Lorenzo sent the emails from his account and under his name, in his capacity as director of investment banking at Charles Vista. While Gregg Lorenzo supplied the content of the false statements for inclusion in Lorenzo's email messages, Lorenzo effectively vouched for the emails' contents and put his reputation on the line by listing his personal phone number and inviting the recipients to "call with any questions." J.A. 794, 796. Nor did the dissemination of the false statements to investors result only from the separate "decision of an independent entity." *Janus*, 564 U.S. at 145. Lorenzo himself communicated with investors, directly emailing them misstatements about the debenture offering.

Unlike in *Janus*, therefore, the recipients of Lorenzo's emails were not exposed to the false information only through the intervening act of "another person." *Id.* For the same reasons, Lorenzo's conduct also differs from the actions considered in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). There, the Supreme

Court held that parties who allegedly played a role in a scheme to make false statements to investors could not be held liable in a private action under Rule 10b-5. The Court explained that the parties' acts "were not disclosed to the investing public" and they "had no role" in "disseminating" the misstatements in question. *Id.* at 155, 161. Lorenzo, unlike the defendants in *Janus* and *Stoneridge*, transmitted misinformation directly to investors, and his involvement was transparent to them.

As a result, insofar as the *Janus* Court declined to bring the investment adviser's actions in that case within the fold of Rule 10b-5 because doing so might reach too many persons fairly considered to be aiders and abettors, the same is not true of Lorenzo's distinct conduct in this case. The Court's concern that "aiders and abettors would be almost nonexistent" if a private action under Rule 10b-5 reached "an undisclosed act preceding the decision of an independent entity to make a public statement," *Janus*, 564 U.S. at 143, 145, need not obtain in the case of a person's self-attributed communications sent directly to investors (and backed by scienter). Lorenzo's actions thus can form the basis of a violation of Rules 10b-5(a) and (c) (as well as Sections 10(b) and 17(a)(1)) while still leaving ample room for "distinction between those who are primarily liable . . . and those who are secondarily liable." *Id.* at 143 n.6; *see Stoneridge*, 552 U.S. at 166 ("[T]he implied right of action in § 10(b) continues to cover secondary actors who commit primary violations." (citing *Central Bank*, 511 U.S. at 191)).

3. Lorenzo intimates more broadly that actions involving false statements must fit within Rule 10b-

5(b) and cannot be brought separately under Rules 10b-5(a) or (c) (or Section 17(a)(1)). We know of no blanket reason, however, to treat the various provisions as occupying mutually exclusive territory, such that false-statement cases must reside exclusively within the province of Rule 10b-5(b). And any suggestion that the coverage of Rule 10b-5(b) must be distinct from that of Rules 10b-5(a) and (c) presumably would mean that each of the latter two provisions likewise must occupy entirely separate ground from one another. In our view, however, the provisions' coverage may overlap in certain respects.

Significantly, the Supreme Court recently described Rule 10b-5 in a manner confirming that conduct potentially subject to Rule 10b-5(b)'s bar against making false statements can also fall within Rule 10b-5(a)'s more general prohibition against employing fraudulent devices: the Court explained that "Rule 10b-5 . . . forbids the use of any 'device, scheme, or artifice to defraud' (*including* the making of any 'untrue statement of material fact' or any similar 'omi[ssion]')." *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1063 (2014) (emphasis added).

The Court has also held that, although Section 14 of the Exchange Act establishes "a complex regulatory scheme covering proxy solicitations," the inapplicability of Section 14 to false statements in proxy materials does not preclude the application of Rule 10b-5 to the same statements. *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 468 (1969). "The fact that there may well be some overlap is neither unusual nor unfortunate," the Court explained. *Id.* Here, correspondingly, Rules 10b-5(a) and (c), as well as Sections 10(b) and 17(a)(1), may

encompass certain conduct involving the dissemination of false statements even if the same conduct lies beyond the reach of Rule 10b-5(b).

In accordance with that understanding, a number of decisions have held that securities-fraud allegations involving misstatements can give rise to liability under related provisions even if the conduct in question does not amount to "making" a statement under *Janus*. *See, e.g.*, *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 795-96 (11th Cir. 2015); *SEC v. Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014); *SEC v. Benger*, 931 F. Supp. 2d 904, 905-06 (N.D. Ill. 2013); *SEC v. Familant*, 910 F. Supp. 2d 83, 93-95 (D.D.C. 2012); *SEC v. Stoker*, 865 F. Supp. 2d 457, 464-65 (S.D.N.Y. 2012). We reach the same conclusion here with respect to the role played by Lorenzo in disseminating the false statements in his email messages to investors.

4. Our dissenting colleague would find that Lorenzo's actions did not violate Rules 10b-5(a) or (c), or Sections 10(b) or 17(a)(1). He advances two reasons for reaching that conclusion, each of which, in our respectful view, is misconceived.

a. The dissent's central submission is that Lorenzo acted without any intent to deceive or defraud. As our colleague sees things, Lorenzo simply transmitted false statements supplied by Gregg Lorenzo without giving any thought to their content. *See infra* at 1, 6 (Kavanaugh, J., dissenting). And Lorenzo ostensibly paid no attention to the content of the statements he sent even though: he included the statements in messages he produced for distribution from his own email account; he sent the statements in his name and capacity as investment banking director; and he

encouraged the recipients to contact him personally with questions about the content. Under our colleague's understanding, that is, Lorenzo offered to answer any questions about his emails even though he had supposedly paid no attention to what they said.

In adopting that understanding, the dissent relies on a finding by the ALJ that Lorenzo sent the emails without thinking about their contents. But the Commission, as we have noted, rejected the ALJ's conclusion to that effect as "implausible" in the circumstances. *Lorenzo*, 2015 WL 1927763, at *9. In our colleague's view, the court should accept the ALJ's finding, notwithstanding the Commission's rejection of it, because the ALJ could assess Lorenzo's credibility as a witness.

The dissent's (and ALJ's) factual understanding, however, is contradicted by Lorenzo's own account of his mental state to this court. Lorenzo raises no challenge to the Commission's rejection of any notion that he paid no heed to his messages' content. What is more, his argument on the issue of scienter rests on his affirmative contemplation—indeed, his ratification—of the content of his emails.

Unlike in his arguments before the ALJ and Commission, Lorenzo, in this court, does not take the position that he simply passed along statements supplied by Gregg Lorenzo without thinking about them. Such a suggestion appears nowhere in his briefing. To the contrary, he argues that, "[a]t the time the email was sent [he] *believed the statements to be true* and he did not act with scienter." Pet'r Reply Br. 6 (emphasis added). He further asserts that he "*had a good faith belief in the veracity of the statements*

contained in the email that was drafted by Gregg Lorenzo." Pet'r Opening Br. 18 (emphasis added); *id.* at 22 ("Petitioner had a good faith belief in the accuracy of the statements contained in the email."). He then attempts to explain why he could have believed the truth of the materially misleading statements contained in his email messages, arguments that we have already rejected in affirming the Commission's findings of scienter. *See supra* Part II.

For present purposes, what matters is that a person cannot have "believed statements to be true" at the time he sent them, or possessed a "good faith belief in their veracity," if he had given no thought to their content in the first place. In that light, our dissenting colleague relies on an account of Lorenzo's state of mind that stands in opposition to Lorenzo's account to us of his own state of mind. (As for our colleague's theory that Lorenzo could have formed a belief about the statements' truthfulness without even reading them, based purely on his trust of Gregg Lorenzo, *see infra* at 7 n.1 (Kavanaugh, J., dissenting), even if we assume that theory were viable as a conceptual matter, Lorenzo's arguments to us about his belief in the statements' truth rest solely on their content, not on any trust-without-verifying level of confidence in Gregg Lorenzo's veracity. Indeed, he testified that, at least as of November 2009, "there is no way on God's green earth [he] thought Gregg Lorenzo was an honest guy." J.A. 176.)

Perhaps Lorenzo concluded he could not overcome the Commission's assessment that it would be implausible to suppose he had blinded himself to the statements' content before sending them to investors

and offering to answer any questions about them. Or perhaps he determined that, insofar as he did so, he would have difficulty denying that he had acted with extreme recklessness—and therefore with scienter—in any event. Regardless, Lorenzo now takes the position that he took stock of the content of the statements, so much so that he formed a belief as to their truthfulness. And we are in no position to embrace an understanding of Lorenzo's mental state that is disclaimed by Lorenzo himself.

To be clear, the point here is not that Lorenzo failed to preserve an argument about scienter. Lorenzo devoted considerable attention to the issue of scienter in his briefing. But Lorenzo's arguments on the issue contain no suggestion that he sent his emails without giving thought to their contents. He instead contends he *did* think about the contents (and reasonably believed them to be truthful). In those circumstances, we do not so much defer to the *Commission*'s assessment of Lorenzo's state of mind over the ALJ's finding that Lorenzo gave no thought to his emails' content. Rather, we accede to *Lorenzo*'s account of his own mental state, which is incompatible with the finding of the ALJ.

But what if Lorenzo in fact had sought to argue to us, in concert with the ALJ's finding, that he gave no thought to the content of his email messages when sending them? In that event—which, again, is not the situation we face—the issue for us would have been whether the Commission's contrary conclusion is supported by substantial evidence, not whether the Commission or the ALJ has the better of the dispute between them on the matter. *See, e.g.*, *Kay v. FCC*, 396

F.3d 1184, 1189 (D.C. Cir. 2005); *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1221 (D.C. Cir. 1994); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

The Commission's finding meets the deferential, substantial-evidence standard. After all, Lorenzo's emails marked the only time he communicated directly with prospective investors, the emails concerned a securities offering by his sole investment banking client, the emails said he would personally answer questions about their content, and the emails carried his professional imprimatur as director of investment banking—all of which support the Commission's rejection of the idea that Lorenzo simply sent his emails without taking any stock of what they said.

b. Even accepting that Lorenzo thought about the statements in his emails and sent them with an intent to deceive, the dissent would still conclude that Lorenzo's conduct falls outside the ambit of Rules 10b-5(a) and (c), and Sections 10(b) and 17(a)(1). *See infra* at 9 (Kavanaugh, J., dissenting). Our colleague grounds that conclusion in his agreement with the proposition put forward by certain other courts of appeals to the effect that "scheme liability"—i.e., the conduct prohibited by Rules 10b-5(a) and (c)—requires something more than false or misleading statements. *See Pub. Pension Fund Grp. v. KV Pharma. Co.*, 679 F.3d 972, 987 (8th Cir. 2012); *WPP Luxembourg Gamma Three Sari v. Spot Runner, Inc.*, 655 F.3d 1039, 1057-58 (9th Cir. 2011); *Lentell v. Merill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005).

Our colleague appears to read those decisions' embrace of that proposition to rest on the need to

maintain a distinction between primary liability and secondary liability under Rule 10b-5. We have described the *Janus* Court's reliance on that concern and explained our conclusion that it does not carry the day in the specific circumstances of Lorenzo's conduct. *See supra* Part III.B.2.

Moreover, we do not read the referenced courts of appeals' decisions to rest on concerns about preserving a distinction between primary and secondary liability. None of those decisions discusses (or mentions) the concepts of primary and secondary liability or any need to maintain a separation between them. Indeed, two of the three decisions postdate *Janus*, yet neither cites *Janus*, much less invokes *Janus*'s concerns with construing the scope of Rule 10b-5(b) in a manner that would encompass too many aiders-and-abettors.

In addition, it is far from clear that the rule articulated by those decisions could suitably be grounded in concerns with preserving a distinction between primary and secondary liability. According to the decisions, a "defendant may only be liable as part of a fraudulent scheme based upon misrepresentations and omissions under Rules 10b-5(a) or (c) when the scheme also encompasses conduct beyond those misrepresentations or omissions." *WPP Luxembourg*, 655 F.3d at 1057; *see KV Pharma.*, 679 F.3d at 987; *Lentell*, 396 F.3d at 177. That understanding would be overinclusive if the objective in fact were to assure that aiders-and-abettors are not held primarily liable under those provisions.

Consider, for instance, the facts of *WPP Luxembourg*. There, the plaintiffs alleged sufficient facts to make out a claim of materially misleading

omissions under Rule 10b-5(b). 655 F.3d at 1051. There was no question that the defendants faced primary (not secondary) liability if the facts as pleaded were proved. *Id.* Yet the court held that the defendants could not be liable under Rules 10b-5(a) or (c) because there were no allegations against them apart from misstatements or omissions. *Id.* at 1057-58. The court's requirement that plaintiffs prove more than misstatements thus barred liability under those provisions even though there could have been no concerns about blurring the distinction between primary and secondary liability. Perhaps it is unsurprising, then, that, while Lorenzo relies on the importance of maintaining the primary-secondary liability distinction, he makes no reference to *WPP Luxembourg* or the other two decisions in his briefing.

For those reasons, we disagree with our dissenting colleague's suggestion that our holding conflicts with those decisions with regard to the primary-secondary liability distinction. *See infra* at 9 (Kavanaugh, J., dissenting). We do not understand those decisions to turn on that distinction.

Those decisions do generally state, however, that Rules 10b-5(a) and (c) require something more than misstatements. But they did not have occasion to elaborate on that understanding to any significant extent—including, importantly for purposes of this case, whether the same interpretation would extend to Section 17(a)(1). Insofar as those courts of appeals would find Lorenzo's actions to lie beyond the reach of those provisions, we read the provisions differently. Lorenzo's particular conduct, as we have explained, fits comfortably within the language of Rules 10b-5(a) and (c), along with that of Sections 10(b) and 17(a)(1).

Finally, we briefly respond to our dissenting colleague's belief that there is an incongruity in deciding both that Lorenzo was not a maker of the false statements under Rule 10b-5(b) and that he nonetheless employed a fraudulent device and engaged in a fraudulent act under Rules 10b-5(a) and (c) and Section 17(a)(1). *See infra* at 11 (Kavanaugh, J., dissenting). Those combined decisions, in our view, follow naturally from the terms of the provisions. Lorenzo was not the "maker" of the false statements because he lacked ultimate authority over them. Still, he "engaged" in a fraudulent "act" and "employed" a fraudulent "device" when, with knowledge of the statements' falsity and an intent to deceive, he sent the statements to potential investors carrying his stamp of approval as investment banking director. One can readily imagine persons whose ministerial acts in connection with false statements would fail to qualify either as "making" the statements or as "employing" any fraudulent device. Lorenzo, in our view, is not such a person.

IV.

Lorenzo's final challenge concerns the sanctions imposed against him. The Commission permanently barred Lorenzo "from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stocks." *Lorenzo*, 2015 WL 1927763, at *17. The Commission also ordered him to pay a $15,000 monetary penalty. Lorenzo argues that those penalties are arbitrary and capricious for various reasons, including that they are

disproportional to the severity of his misconduct and to the sanctions imposed in similar cases.

We decline to reach the merits of Lorenzo's challenges. The Commission chose the level of sanctions based in part on a misimpression that Lorenzo was the "maker" of false statements in violation of Rule 10b-5(b). Because we have now overturned the Commission's finding of liability under Rule 10b-5(b), we vacate the sanctions and remand the matter to enable the Commission to reconsider the appropriate penalties.

We have no assurance that the Commission would have imposed the same level of penalties in the absence of its finding of liability for making false statements under Rule 10b-5(b). The Commission expressly grounded its sanctions on its perceptions about the "egregiousness of Lorenzo's conduct" and the "degree of scienter involved," as well as the need to deter others "from engaging in similar misconduct." *Id.* at *12, *14. But the Commission operated under the assumption that Lorenzo devised, and had ultimate authority over, the substance of the false statements contained in the email messages he sent to investors. That assumption, as we have concluded, is unsupported by the record evidence. The Commission in fact specifically based its sanctions in some measure on a belief that Lorenzo improperly sought to "shift blame" by asserting "that he sent the emails at Gregg Lorenzo's direction." *Id.* at *13. But as the record indicates, that is essentially what happened.

Because we "cannot be certain what role, if any," the Commission's misperception that Lorenzo was the "maker" of the false statements ultimately played in its

choice of sanctions, "we must remand" to enable it to reassess the appropriate penalties. *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940-41 (D.C. Cir. 1991). When the Commission does so under a correct understanding about the nature of Lorenzo's misconduct, it can assess "whether the sanction is out of line with the agency's decisions in other cases" involving comparable misconduct—which, as we have observed, is one consideration informing review of penalties for arbitrariness and capriciousness. *Collins v. SEC*, 736 F.3d 521, 526 (D.C. Cir. 2013).

The Commission, in this regard, notes our previous observation that the "Commission is not obligated to make its sanctions uniform, so we will not compare this sanction to those imposed in previous cases." *Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004) (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186-87 (1973)). In that vein, we have explained that a mere absence of uniformity will not necessarily render a particular action "unwarranted in law," *id.* at 488, or "unwarranted as a matter of policy," *Kornman*, 592 F.3d at 188. But we have never declined to compare past-and-present Commission sanctions in the context of an arbitrary-and-capricious challenge. In fact, our decision in *Collins* clarified that such a challenge may be brought to review the propriety of the Commission's choice of sanction in a given case as compared with sanctions in comparable situations. *See* 736 F.3d at 526.

* * * * *

For the foregoing reasons, we grant the petition for review in part, vacate the sanctions imposed by the

Commission, and remand the matter for further consideration.

So ordered.

KAVANAUGH, *Circuit Judge*, dissenting: Suppose you work for a securities firm. Your boss drafts an email message and tells you to send the email on his behalf to two clients. You promptly send the emails to the two clients without thinking too much about the contents of the emails. You note in the emails that you are sending the message "at the request" of your boss. It turns out, however, that the message from your boss to the clients is false and defrauds the clients out of a total of $15,000. Your boss is then sanctioned by the Securities and Exchange Commission (as is appropriate) for the improper conduct.

What about you? For sending along those emails at the direct behest of your boss, are you too on the hook for the securities law violation of *willfully* making a false statement or *willfully* engaging in a scheme to defraud?

According to the SEC, the answer is yes. And the SEC concludes that your behavior – in essence forwarding emails after being told to do so by your boss – warrants a *lifetime suspension* from the securities profession, on top of a monetary fine.

That is what happened to Frank Lorenzo in this case. The good news is that the majority opinion vacates the lifetime suspension. The bad news is that the majority opinion – invoking a standard of deference that, as applied here, seems akin to a standard of "hold your nose to avoid the stink" – upholds much of the SEC's decision on liability. I would vacate the SEC's

conclusions as to both sanctions and liability. I therefore respectfully dissent.

* * *

The SEC initiated an enforcement action against Frank Lorenzo and his boss. The boss eventually reached a settlement agreement with the SEC. Apparently thinking he had done little wrong by merely sending emails to two clients at the request of his boss, Lorenzo did not settle.

The case then proceeded through three stages: a trial before an SEC administrative law judge, review by the Commission itself, and then review by this Court. To understand my disagreement with the majority opinion, it is necessary to describe all three acts in this drama.

Act One: The Administrative Law Judge

The case proceeded to trial before an administrative law judge. This was not your usual trial. Surprisingly, the SEC did not present testimony from Lorenzo's boss or from anyone else at the securities firm where Lorenzo worked. Instead, only Lorenzo testified about the extent of his involvement in drafting and sending the emails.

After hearing Lorenzo's testimony and weighing his credibility, the judge concluded that Lorenzo's boss had "drafted" the emails in question and that Lorenzo's boss had "asked" Lorenzo to send the emails to two clients. ALJ Op. at 5 (Dec. 31, 2013), J.A. 906. The judge also concluded that Lorenzo did not read the text of the emails and that Lorenzo "sent the emails without even thinking about the contents." *Id.* at 7, J.A. 908; *see*

id. at 9, J.A. 910 ("Had he taken a minute to read the text . . ."). Furthermore, the judge noted that the emails themselves expressly stated that they were being sent at "the request" of Lorenzo's boss. *Id.* at 5, J.A. 906.

Those factual findings were very favorable to Lorenzo and should have cleared Lorenzo of any serious wrongdoing under the securities laws. At most, the judge's factual findings may have shown some mild negligence on Lorenzo's part. The judge, however, went much further than that. The judge somehow concluded that those findings of fact demonstrated that Lorenzo *willfully* violated the securities laws – meaning that Lorenzo acted with an intent to deceive, manipulate, or defraud. (A finding of willfulness, as opposed to a finding of negligence, matters because it subjects a defendant to much higher penalties.) As a sanction, the judge not only fined Lorenzo, but also imposed a *lifetime suspension* that prevents Lorenzo from ever again working in the securities industry.

The administrative law judge's factual findings and legal conclusions do not square up. If Lorenzo did not draft the emails, did not think about the contents of the emails, and sent the emails only at the behest of his boss, it is impossible to find that Lorenzo acted "willfully." That is Mens Rea 101. Establishing that a defendant acted willfully in this context requires proof at least of the defendant's "intent to deceive, manipulate, or defraud." *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008) (internal quotation marks omitted). How could Lorenzo have intentionally deceived the clients when he did not draft

the emails, did not think about the contents of the emails, and sent the emails only at his boss's direction?

The administrative law judge's decision in this case contravenes basic due process. A finding that a defendant possessed the requisite mens rea is essential to preserving individual liberty. *See, e.g.*, *Morissette v. United States*, 342 U.S. 246, 250-51, 263 (1952); *see also United States v. Burwell*, 690 F.3d 500, 527 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting); *United States v. Moore*, 612 F.3d 698, 703 (D.C. Cir. 2010) (Kavanaugh, J., concurring); *Bluman v. FEC*, 800 F. Supp. 2d 281, 292 (D.D.C. 2011) (three-judge panel). As Justice Jackson explained: "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to.'" *Morissette*, 342 U.S. at 250-51 (footnote omitted).

The administrative law judge's opinion in this case did not heed those bedrock mens rea principles. Given the judge's pro-Lorenzo findings of fact, a legal conclusion that Lorenzo "willfully" violated the securities laws makes a hash of the term "willfully," and of the deeply rooted principle that punishment must correspond to blameworthiness based on the defendant's mens rea.

Act Two: The Securities and Exchange Commission

Fast forward to the Securities and Exchange Commission, which heard the appeal of the administrative law judge's decision. Surely the Commission would realize that the administrative law judge's factual findings did not support the judge's legal conclusions and sanctions?

And indeed, the Commission did come to that realization. But instead of vacating the order against Lorenzo, the Commission did something quite different and quite remarkable. In a Houdini-like move, the Commission rewrote the administrative law judge's factual findings to make those factual findings correspond to the legal conclusion that Lorenzo was guilty and deserving of a lifetime suspension.

Recall what the administrative law judge found: that Lorenzo's boss "drafted" the emails, that Lorenzo did not think about the contents of the emails, and that Lorenzo sent the emails only after being asked to do so by his boss. ALJ Op. at 5, J.A. 906. The judge reached those conclusions only after hearing Lorenzo testify and assessing his credibility in person.

Without hearing from Lorenzo or any other witnesses, the Commission simply swept the judge's factual and credibility findings under the rug. The Commission concluded that Lorenzo himself was "responsible" for the emails' contents. *In the Matter of Francis V. Lorenzo*, Securities Act Release No. 9762, Exchange Act Release No. 74836 at 16 (Apr. 29, 2015), J.A. 930. How did the Commission magically explain its decision to discard the administrative law judge's

findings of fact? Easy. In a footnote, the Commission said that it did not need to "blindly" accept the administrative law judge's factual findings and credibility judgments. *Id.* at 16 n.32, J.A. 930 n.32. Voila.

The Commission's handiwork in this case is its own debacle. Faced with inconvenient factual findings that would make it hard to uphold the sanctions against Lorenzo, the Commission – without hearing any testimony – simply manufactured a new assessment of Lorenzo's credibility and rewrote the judge's factual findings. So much for a fair trial.

Act Three: This Court

Fast forward to this Court. To its credit, the majority opinion rightly concludes that Lorenzo did not "make" the statements in the emails for purposes of Rule 10b-5(b) liability. *See Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011). And the majority opinion, also to its credit, vacates the grossly excessive lifetime suspension of Lorenzo and sends the case back to the SEC for reconsideration of the appropriate penalties.

So far, so good. But applying what it calls "very deferential" review, the majority opinion upholds the finding of liability against Lorenzo under Section 10(b), Rule 10b-5(a) and (c), and Section 17(a). Maj. Op. 7, 18-25. The majority opinion does so on the ground that Lorenzo willfully engaged in a scheme to defraud even though he did not "make" the statements in the emails.

I disagree on two alternative and independent grounds with the majority opinion's merits analysis.

First, the majority opinion does not heed the administrative law judge's factual conclusions, which were based on the judge's in-person assessment of Lorenzo's testimony at trial. Those factual conclusions demonstrate that Lorenzo lacked the necessary mens rea of willfulness.

To show that Lorenzo willfully engaged in a scheme to defraud, the SEC had to prove that Lorenzo acted with an intent to deceive, manipulate, or defraud. But recall that, as findings of fact, the administrative law judge concluded (after hearing Lorenzo testify) that Lorenzo did not draft the emails, did not think about the contents of the emails, and sent the emails only at the behest of his boss.

In light of the administrative law judge's factual findings, how can Lorenzo be deemed to have willfully engaged in a scheme to defraud? The majority opinion says that the facts found by the administrative law judge are not the right facts. Instead, in reaching its conclusion, the majority opinion relies on the SEC's alternative facts, which the SEC devised on its own without hearing from any witnesses. *See* Maj. Op. 20-21, 26-29 (adopting the SEC's view of the facts over the administrative law judge's view).[1]

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[1] The majority opinion also says that Lorenzo, in his briefing here, does not describe his own state of mind in the way that the administrative law judge did. In other words, the majority opinion says that Lorenzo accepts the SEC's reconstruction of the facts. I disagree. To be sure, Lorenzo advances the alternative argument that he should prevail even if the SEC's reconstruction of the facts is correct. But Lorenzo certainly does not agree with or accept the SEC's reconstruction.

It is true that, under certain circumstances, an agency such as the SEC may re-examine and overturn an administrative law judge's factual findings. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492 (1951). But an agency does not have carte blanche to rewrite an administrative law judge's factual determinations. Rather, an agency must act reasonably when it disregards an administrative law judge's factual findings, a point the SEC's attorney expressly acknowledged at oral argument. *See* Tr. of Oral Arg. at 28. It is black-letter law, therefore, that "a contrary initial decision" by an administrative law judge "may undermine the support for the agency's ultimate determination." Ronald M. Levin & Jeffrey S. Lubbers, *Administrative Law and Process* 101 (6th ed. 2017). And here is the key principle that speaks directly to this case: "When the case turns on eyewitness testimony . . . the initial decision should be given considerable weight: the ALJ was able to observe the demeanor of the witnesses and assess their credibility and veracity first hand." *Id.*

Moreover, in making this point, the majority opinion draws a dichotomy between Lorenzo's good-faith belief (as noted in his briefs) in the accuracy of the emails and Lorenzo's statement that he did not think about the contents of the email. That is a false dichotomy. When forwarding an email on behalf of your boss, you could have a good-faith belief in its accuracy because you trust your boss, or at least have no reason to delve deeply into the particulars of the email's contents, not because you have necessarily read or independently verified the contents of the email. The majority opinion notes that Lorenzo, "as of November 2009," did not trust his boss. Maj. Op. 27. But that date is of course *after* the events at issue in this case.

In my view, the majority opinion misapplies those black-letter principles. Contrary to the majority opinion's acceptance of the SEC's reconstruction of the facts in this case, I would conclude that the SEC's rewriting of the administrative law judge's findings of fact was utterly unreasonable and should not be sustained or countenanced by this Court. Given that Lorenzo was the only relevant witness at trial (dwell again on that point for a few moments) and given that his credibility was central to the case, the SEC had no reasonable basis to run roughshod over the administrative law judge's findings of fact and credibility assessments. In short, the SEC's rewriting of the findings of fact deserves judicial repudiation, not judicial deference or respect.

Instead of deferring to the SEC's creation of an alternative factual record, as the majority opinion does, we should examine the administrative law judge's underlying findings of fact and ask whether *those findings* suffice to support the conclusion that Lorenzo willfully engaged in a scheme to defraud. The answer to that question, as explained above, is a clear no.[2]

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[2] At oral argument, counsel for the SEC actually stated that it would have been "more difficult" for the SEC to find Lorenzo liable if Lorenzo's email had said that it was being sent "on behalf of" his boss instead of "at the request of" his boss. Counsel for the SEC asserted that those two phrases were "meaningfully different." Tr. of Oral Arg. at 30. With respect, I find that argument absurd and an illustration of how the Commission jumped the rails in this case. It is startling that the SEC thinks such a wafer-thin semantic distinction can make the difference between (i) a lifetime suspension from your chosen profession and (ii) no penalty at all.

Second, put that aside. Even if I am wrong about the first point, the majority opinion still suffers from a separate flaw, in my view.

The majority opinion creates a circuit split by holding that mere misstatements, standing alone, may constitute the basis for so-called scheme liability under the securities laws – that is, willful participation in a scheme to defraud – even if the defendant did not make the misstatements.[3] No other court of appeals has adopted the approach that the majority opinion adopts here. Other courts have instead concluded that scheme liability must be based on conduct that goes beyond a defendant's role in preparing mere misstatements or omissions made by others. *See, e.g.*, *Public Pension Fund Group v. KV Pharmaceutical Co.*, 679 F.3d 972, 987 (8th Cir. 2012); *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011); *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005); *see also SEC v. Kelly*, 817 F. Supp. 2d 340, 343-44 (S.D.N.Y. 2011). Otherwise, the SEC would be able to evade the important statutory distinction between primary liability and secondary (aiding and abetting) liability. After all, if those who aid and abet a misstatement are themselves primary violators for engaging in a scheme to defraud, what would be the point of the distinction between primary and secondary liability?

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[3] On page 31, the majority opinion ultimately appears to acknowledge the circuit split: "Insofar as those courts of appeals would find Lorenzo's actions to lie beyond the reach of those provisions, we read the provisions differently."

The distinction between primary and secondary liability matters, particularly for private securities lawsuits. For decades, however, the SEC has tried to erase that distinction so as to expand the scope of primary liability under the securities laws. For decades, the Supreme Court has pushed back hard against the SEC's attempts to unilaterally rewrite the law. *See Janus*, 564 U.S. 135; *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.* 552 U.S. 148 (2008); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). Still undeterred in the wake of that body of Supreme Court precedent, the SEC has continued to push the envelope and has tried to circumvent those Supreme Court decisions. *See, e.g., In the Matter of John P. Flannery & James D. Hopkins*, Release No. 3981 (Dec. 15, 2014). This case is merely the latest example.[4]

I agree with the other courts that have rejected the SEC's persistent efforts to end-run the Supreme Court.

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[4] In this case, the SEC relied on its prior decision in *Flannery*. But as one respected commentator persuasively explained, the SEC's *Flannery* decision is wrong. "The substantive concern is that the Commission defined primary liability under portions of the major anti-fraud provisions in expansive ways that disregarded the reasoning and rationale of the Supreme Court and some courts of appeals. The Supreme Court has sought to clarify the distinction between primary and secondary liability under Rule 10b-5, yet the Commission's *Flannery* decision all but eradicated the distinction and committed the same error with Section 17(a). It sought to regain the ground on primary liability that was lost in *Stoneridge* and *Janus* and then went further with novel constructions of primary liability based on lawful, non-deceptive actions or exorbitant doctrines of but-for causality." Andrew N. Vollmer, *SEC Revanchism and the Expansion of Primary Liability Under Section 17(a) and Rule 10b-5*, 10 VA. L. & BUS. REV. 273, 340 (2016).

I therefore respectfully disagree with the majority opinion that Lorenzo's role in forwarding the alleged misstatements made by Lorenzo's boss can be the basis for scheme liability against Lorenzo.

Taking a step back on the scheme liability point, moreover, think about the oddity of the majority opinion's combined legal rulings today. The majority opinion emphatically holds that Lorenzo did not "make" the statements in the emails. In reaching that conclusion, the majority opinion accurately says that "Lorenzo transmitted statements devised by" Lorenzo's boss at his boss's "direction." Maj. Op. 16. The majority opinion also correctly notes that Lorenzo's boss "asked Lorenzo to send the emails, supplied the central content, and approved the messages for distribution." Maj. Op. 17. At the same time, however, the majority opinion emphatically holds that Lorenzo nonetheless willfully engaged in a scheme to defraud solely because of the statements made by his boss. That combined holding makes little sense (at least to me) under the facts of this particular case. Nor does it make much sense under the law, which is presumably why the other courts of appeals have rejected that kind of legal jujitsu. In these circumstances, perhaps the alleged offender (here, Lorenzo) could have been charged with aiding and abetting, if the relevant mens rea requirements for aiding and abetting liability were met. But Lorenzo may not be held liable as a primary violator, in my view.

* * *

Administrative adjudication of individual disputes is usually accompanied by deferential review from the Article III Judiciary. That agency-centric process is in

some tension with Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment right to a jury trial in civil cases. *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 227-57 (2014). That tension is exacerbated when, as here, the agency's political appointees – without hearing from any witnesses – disregard an administrative law judge's factual findings. That said, the Supreme Court has allowed administrative adjudication ever since *Crowell v. Benson*, 285 U.S. 22 (1932). But the premise of *Crowell v. Benson* is that, putting aside any formal constitutional problems with the notion of administrative adjudication, the administrative adjudication process will at least operate with efficiency and with fairness to the parties involved. This case, among others, casts substantial doubt on that premise.

Securities brokers such as Frank Lorenzo obviously do not tug at the judicial heartstrings. And maybe Lorenzo really is guilty of negligence (or worse). But before the SEC reaches such a conclusion, Lorenzo is entitled to a fair process just like everyone else. *Cf. United States v. Burwell*, 690 F.3d 500, 527 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting). He has not received a fair process in this case.

I hope that the SEC on remand pays attention, comes to its senses, and (at a minimum) dramatically scales back the sanctions in this case. Indeed, notwithstanding the majority opinion, I hope that the SEC, on its own motion, goes further than that: The SEC should vacate the order against Lorenzo in its entirety and either end this case altogether or (if

appropriate and permissible) fairly start the process anew before the administrative law judge.

I firmly disagree with the majority opinion's decision to sustain the SEC's findings of liability under Section 10(b), Rule 10b-5(a) and (c), and Section 17(a). I respectfully dissent.

APPENDIX B

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9762 / April 29, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74836 / April 29, 2015

Admin. Proc. File No. 3-15211

[Filed April 29, 2015]

In the Matter of	)
	)
FRANCIS V. LORENZO	)
c/o Robert G. Heim	)
Meyers & Heim LLP	)
444 Madison Ave., 30th Floor	)
New York, NY 10022	)
	)

OPINION OF THE COMMISSION

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Antifraud Violations

A formerly registered representative committed securities fraud by sending two potential investors emails that he knew contained false and misleading

information about his firm's client. *Held*, it is in the public interest to bar respondent from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock; order him to cease and desist from committing or causing any violations or future violations of the provisions violated; and order him to pay a civil monetary penalty of $15,000.

APPEARANCES:

Robert G. Heim, for Francis V. Lorenzo.

Alex Janghorbani and *Jack Kaufman*, for the Division of Enforcement.

Appeal filed: January 27, 2014
Last brief received: May 7, 2014
Oral argument: March 30, 3015

I.

Francis V. Lorenzo, formerly a registered representative, appeals an administrative law judge's finding that he violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5 by sending false and misleading statements to prospective investors.[1] For these violations, the law judge barred Lorenzo from the securities industry, ordered him to cease and desist from violating the antifraud

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[1] *Francis V. Lorenzo*, Initial Decision Release No. 544, 2013 WL 6858820 (Dec. 31, 2013).

provisions, and ordered him to pay a third-tier civil monetary penalty of $15,000. The Division cross-appeals the imposition of the civil penalty and asks that we increase the penalty to "at least $100,000."

The charges against Lorenzo stem from emails he sent to retail customers that contained false and misleading statements about a debenture offering by his client, Waste2Energy Holdings, Inc. ("W2E"). The emails promised the customers that their investment would have three "layers of protection": (i) that W2E had more than $10 million "in confirmed assets"; (ii) that W2E had "purchase orders and [letters of intent] for over $43 mm in orders"; and (iii) that Lorenzo's employer, Charles Vista, LLC, had "agreed to raise additional monies to repay these Debenture holders (if necessary)." Lorenzo admitted at the hearing that he knew each of these statements was false and/or misleading when he sent them. For the reasons below, his conduct violated the antifraud provisions of the federal securities laws and warrants imposition of an industry-wide bar, a cease-and-desist order, and a $15,000 civil penalty. Our findings are based on an independent review of the record.[2]

II.

Lorenzo was director of investment banking at Charles Vista, LLC, a registered broker-dealer owned

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[2] We note that Rule of Practice 451(d), 17 C.F.R. § 201.451(d), permits a member of the Commission who was not present at oral argument to participate in the decision of the proceeding if that member has reviewed the oral argument transcript before such participation. Commissioner Aguilar has made the requisite review.

by Gregg Lorenzo,[3] from February 2009 through February 2010 (the relevant time here). As Lorenzo described it, Charles Vista was "a small boiler room." Its registered representatives, Lorenzo explained, engaged in high-pressure sales tactics, were "not being a hundred percent accurate in their presentations" to brokerage clients, and seemed to be "stretching the truth."[4] Lorenzo's only investment banking client during the relevant time was W2E. Lorenzo's responsibilities included preparing offering documents for W2E; making sure the company made all material disclosures; and conducting due diligence, including reviewing the company's financial statements and public filings.

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[3] Gregg Lorenzo is not related to the respondent. We will refer to the respondent as "Lorenzo" and to Gregg Lorenzo as "Gregg Lorenzo."

[4] Charles Vista and Gregg Lorenzo settled related charges against them in November 2013. *Gregg C. Lorenzo*, Securities Act Release No. 9480, 2013 WL 6087352 (Nov. 20, 2013) (Settlement Order). Before that settlement, on June 17, 2013, Charles Vista had already withdrawn its registration as a broker-dealer, and FINRA cancelled Charles Vista's membership on July 31, 2013, for failure to pay outstanding fees. We take official notice of this information on BrokerCheck, an electronic database maintained by FINRA and available at http://brokercheck.finra.org. *See* 17 C.F.R. § 201.323 (rule of practice relating to official notice). On June 18, 2013, FINRA also permanently barred Gregg Lorenzo from association with any member for his refusal to comply with multiple requests to appear for an on-the-record interview. *See* http://brokercheck.finra.org (last visited April 28, 2015).

A. Lorenzo knew that W2E was in dire financial condition.

According to W2E's Form 8-K (filed June 3, 2009), the company developed technology for customers "to convert[] biomass or other solid waste streams traditionally destined for landfill or incineration into clean renewable energy." But according to Lorenzo, W2E's technology "didn't really work" and the company's "financial well-being was horrible." As the company explained in its Form 8-K, W2E had been "operating at a substantial operating loss each year since [its] inception," had "a substantial accumulated deficit," and expected "to continue to incur substantial losses for the foreseeable future." The company's unaudited financial statements, which were included in the Form 8-K, disclosed that the company had total assets (as of December 31, 2008) of approximately $14 million and total liabilities of approximately $9.5 million. Of its approximately $14 million in total assets, W2E attributed more than $10 million to "intangibles," which consisted of intellectual property. The company's Form 8-K further disclosed that W2E's business operations depended on generating substantial revenues from one customer, Ascot Environmental Ltd., which subjected W2E to "significant financial and other risks in the operation of [its] business." The company also disclosed that its independent registered auditors had "expressed substantial doubt about [its] ability to continue as a going concern."

Lorenzo testified that he saw the company's Form 8-K shortly after the company issued it and was concerned at the time that W2E's purported intangible

assets were not actually worth $10 million. He instead believed that the intangibles were a "dead asset." There was "no way," Lorenzo testified, that the company could "get even close to $10 million" for the assets, and the company would be "lucky" to receive $1 million for the assets. Lorenzo also thought it was significant that W2E's financial statements were unaudited because "there is way too much risk for investors" without an audit.

B. Lorenzo helped prepare the private placement memorandum for W2E's convertible debentures offering.

By mid-August 2009, W2E was finalizing an audit of its financial statements for the fiscal year ending March 31, 2009, so that those statements could be included in its Form 10-Q. Around the same time, the company also began preparing a private placement of up to $15,000,000 in 12 percent convertible debentures.[5] Charles Vista was the exclusive placement agent for the debenture offering, for which the firm was to be paid nearly 20 percent of the offering proceeds—an amount Lorenzo described as "exorbitant." Lorenzo testified that he was promised seven to nine percent of any money he raised from the offering, but that he ultimately received only one percent of the money he raised.

Lorenzo helped W2E prepare the private placement memorandum ("PPM"). At least twice during that

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[5] Debentures are "debt secured only by the debtor's earning power, not by a lien on any specific asset." BLACK'S LAW DICTIONARY 330 (9th ed. 2009), *available at* Westlaw Blacks.

process, Lorenzo asked W2E to disclose the $10 million of intangible assets in its PPM because he thought it was "material." On August 26, 2009, Lorenzo emailed edits and comments regarding the PPM to the company, writing that, "[w]e want to mention that the company has IP and Intangibles valued at $10,038,558" (emphasis in original). Lorenzo testified that he based that number on the unaudited financial statements in W2E's Form 8-K. On September 1, 2009, Lorenzo emailed additional edits to W2E, again asking that they include a reference to the company's intangible assets. But this time Lorenzo left the value of the assets blank because, he testified, he was no longer sure what the assets were worth. Lorenzo also admitted that, as early as April 2009, he began repeatedly telling Gregg Lorenzo not to sell W2E's debentures as being collateralized by the $10 million asset. Lorenzo explained that he did so because he knew that the assets "provided no protection" to investors and that, if the company defaulted on the debentures, investors would not be able to recoup their money through the liquidation of those assets.

Lorenzo did not recall that anyone from W2E ever responded to his requests to disclose the intangible assets, and ultimately W2E did not disclose a dollar value for its intangible assets in its final PPM, which was dated September 9, 2009. Instead, W2E disclosed only that it had "a significant IP portfolio." The company also reiterated many of the disclosures from its earlier Form 8-K, including that the company "had significant operating losses," did "not expect to be profitable for at least the foreseeable future," and could not "predict when we might become profitable, if ever." The company further stated in the PPM that it was

"wholly reliant on the net proceeds from this Offering to fund [its] proposed business" and that, "[i]f less than the Maximum Offering [$15 million] is sold, [it] will have an immediate need for substantial additional capital and may only have enough capital for less than one month of proposed operations." The company added: "If we are unable to raise substantial capital, investors will lose their entire investment." Lorenzo testified that he received and reviewed the final PPM.

C. W2E announced a complete write down of its intangible assets.

On October 1, 2009, approximately one month after finalizing the PPM, W2E filed an amended Form 8-K and Form 10-Q. Those filings contained audited financial statements for the fiscal year ended March 31, 2009, and reported a complete write-off of W2E's $10 million intellectual property asset and $496,594 in good will. The company stated that, as of March 31, 2009, its total assets were only $370,552 and that its sole contract (with Ascot Environmental) was causing it to incur a net loss.

Lorenzo testified that, although it was his responsibility to review W2E's filings, he only "skimmed the filings and [he] missed the write off." Lorenzo nevertheless acknowledged that, on October 5, four days after the company filed its financial statements disclosing the write down, W2E's CFO sent Lorenzo an email, stating: "The accumulated deficit we have reported is due to three primary issues [including] . . . . [w]rite off of all of our intangible assets . . . of about $11 million." (emphasis in original). Lorenzo admitted that he reviewed the email and therefore understood, by at least October 5, 2005, that the

company had written off the $10 million in intangible assets.

D. Lorenzo emailed two prospective investors about W2E's debenture offering, falsely assuring them of three "layers of protection."

On October 14, 2009, Lorenzo sent a one-page email to two retail customers—Vishal Goolcharan and William Rothe—entitled "W2E Debenture Deal Points." The emails stated that, "[a]t the request of Adam Spero and Gregg Lorenzo, the Investment Banking division of Charles Vista has summarized several key points of the Waste2Energy Holdings, Inc. Debenture Offering."[6] The emails then told the investors, in bold type, "Please read the Offering Memorandum, including all the 'Risk Factors,'" but Lorenzo acknowledged that he did not know whether either customer ever actually saw the PPM because he never sent them one.

Lorenzo's emails next summarized the offering's basics, including the debenture's term and the interest rate, and promised that investors would be paid first in the event of liquidation. The emails then assured investors:

> There are 3 layers of protection:
>
> (I) The Company has over $10 mm in confirmed assets

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[6] This quote is from the email to Goolcharan. The email to Rothe did not mention Adam Spero, stating only that Gregg Lorenzo had asked the investment banking division to summarize the debenture offering.

(II) The Company has purchase orders and LOI's [sic] for over $43 mm in orders

(III) Charles Vista has agreed to raise additional monies to repay these Debenture holders (if necessary).

After noting the debenture holders' right to convert their debt into common stock and to receive a warrant to purchase shares, the emails concluded, "Please call with any questions—Truly, Francis V. Lorenzo."

Lorenzo admitted that, at the time he sent the emails, he knew that the statements about all three layers of supposed protection were false, misleading, or both. Lorenzo acknowledged, for example, that the statement about the company having $10 million in confirmed assets "was never true." Lorenzo testified that he took the $10 million number from the company's unaudited financial statements in its June 2009 Form 8-K, which stated that the company had $10 million in intangible assets. Yet Lorenzo admitted that this number had never been confirmed by auditors or the company; that he knew by the time he sent the emails that the company had written off those assets; and that he himself did not believe the company's intangible assets had been worth anywhere close to $10 million. Lorenzo also admitted that, before sending the emails, he knew that the $43 million in purported purchase orders and LOIs were based only on a single, non-binding, letter of intent, which did not obligate the potential purchaser (or W2E) to do anything. He further acknowledged that, by sometime in September, he had "lost confidence that this 43 million was ever going to happen." Lorenzo similarly admitted that he

knew, at the time he sent the emails, that Charles Vista had not agreed to raise any additional money to repay debenture investors.

Lorenzo explained his sending the emails as a "mistake." Lorenzo testified that he sent the emails without thinking about the contents: "I don't want to minimize the severity of it but, you know, I just didn't give it much thought at the time. My boss asked me to send these e-mails out and I sent them out." On December 18, 2009, one of the email recipients, Vishal Goolcharan, invested $15,000 in W2E's debenture offering (jointly with Roslyn Parmasad). Lorenzo earned one percent (or $150) from that investment.

E. Lorenzo provided misleading investigative testimony about Gregg Lorenzo, Charles Vista, and W2E's debenture offering.

The Division subsequently launched an investigation into Lorenzo and his employer, Charles Vista and Gregg Lorenzo, during which Lorenzo testified under oath in November 2009. Lorenzo told Commission staff that Gregg Lorenzo was an "honest guy"; that he was proud of what Gregg Lorenzo planned at Charles Vista; and that he and Gregg Lorenzo were working toward their "vision" of building Charles Vista into a "high quality investment banking [d]ivision." Lorenzo further testified that he "believed in" selling W2E's debentures and described the sale as one of several "high quality projects."

Lorenzo's subsequent hearing testimony was far different. As noted above, for instance, Lorenzo described Charles Vista as a boiler room and expressed concern that the firm's registered representatives were

not entirely truthful when selling securities. Lorenzo also testified that, by November 2009, "there [was] no way on God's green earth [he] thought Gregg Lorenzo was an honest guy"; that, by October 2009, it was "a stretch" to say that he was proud of the work he and Gregg Lorenzo were doing at Charles Vista; and that he did not think that Charles Vista was a high-quality investment bank. Nor did Lorenzo describe W2E's debenture offering as a high-quality project, instead labeling it a "toxic convertible debt spiral."

Lorenzo testified that he began looking for a new job sometime in October or November 2009 because he had become "unhappy" at Charles Vista. He eventually left Charles Vista in February 2010 and became a managing director at Hunter Wise Securities, LLC, a broker-dealer where Lorenzo focused primarily on arranging funding for both public and private companies. Lorenzo represents that he resigned from this position on April 15, 2014. He is not currently registered.[7]

III.

The Division alleges that Lorenzo violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and Securities Act Section 17(a) by sending two materially misleading emails to customers. Section 10(b) makes it "unlawful for any person directly or indirectly . . . to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of"

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[7] *See* http://brokercheck.finra.org (last visited April 28, 2015).

Commission rules.[8] Rule 10b-5 implements the Commission's authority under Section 10(b).[9] It does so through three subsections that are "mutually supporting rather than mutually exclusive."[10] The first, Rule 10b-5(a), prohibits "directly or indirectly . . . employ[ing] any device, scheme, or artifice to defraud."[11] The second, Rule 10b-5(b), prohibits "directly or indirectly . . . mak[ing] any untrue statement of a material fact or [omitting] to state a material fact necessary in order to make the statements made . . . not misleading."[12] The third, Rule 10b-5(c), prohibits "directly or indirectly . . . engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."[13]

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[8] 15 U.S.C. § 78j(b).

[9] *See John P. Flannery*, Securities Exchange Act Release No. 73840, 2014 WL 7145625, at *10 (Dec. 15, 2014) (citing *United States v. Zandford*, 535 U.S. 813, 816 n.1 (2002)), *appeal docketed*, No. 15-1080 (1st Cir. Jan. 16, 2015).

[10] *Id.* (citing *Cady, Roberts & Co.*, Exchange Act Release No. 6668, 40 SEC 907, 1961 WL 60638, at *4 (Nov. 8, 1961)).

[11] 17 C.F.R. § 240.10b-5(a).

[12] *Id.* § 240.10b-5(b).

[13] *Id.* § 240.10b-5(c).

Section 17(a), in turn, makes it unlawful to engage in certain conduct in "the offer or sale of securities."[14] Like Rule 10b-5, Section 17(a) expresses its prohibitions in three "mutually supporting" subsections.[15] Relevant here is Section 17(a)(1), which, like Rule 10b-5(a), prohibits "directly or indirectly . . . employ[ing] any device, scheme, or artifice to defraud."[16] Liability under Section 17(a) and Rule 10b-5 requires a showing of scienter, which is "a mental state embracing intent to deceive, manipulate, or defraud."[17] As explained below, we agree with the Division that Lorenzo violated these provisions by knowingly sending materially misleading emails to prospective investors.

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[14] 15 U.S.C. § 77q(a). We find, and there is no dispute, that all of the statements and omissions at issue here were made in connection with the offer or sale of securities.

[15] *Cady, Roberts & Co.*, 1961 WL 60638, at *4.

[16] 15 U.S.C. § 77q(a)(1).

[17] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Scienter may be established through "a heightened showing of recklessness." *Flannery*, 2014 WL 7145625, at *10 n.24. This has been "defined as . . . an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it." *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 WL 4481515, at *5 (Dec. 21, 2007); *accord SEC v. Ficken*, 546 F.3d 45, 47–48 (1st Cir. 2008) (finding that Section 17(a)(1), Section 10(b), and Rule 10b–5 require only "a high degree of recklessness" (quotations omitted)); *Rockies Fund, Inc. v. SEC*, 428 F.3d 1088, 1093 (D.C. Cir. 2005) (finding that Rule 10b-5 requires a showing of extreme recklessness).

A. The emails that Lorenzo sent were misleading.

We first examine whether the emails Lorenzo sent were misleading. There is no dispute that the statement regarding the first layer of protection—that the company had "over $10 mm in confirmed assets"—was misleading. In fact, Lorenzo admitted that this statement had never been true. Lorenzo derived that number from the $10 million in intangible assets listed in the company's unaudited financial statements. But by the time Lorenzo wrote the emails, W2E had written off those assets and disclosed that it had only $400,000 in assets remaining. And Lorenzo himself testified that he did not believe at the time he sent the emails that the company's intangible assets were worth anywhere close to $10 million. Lorenzo's emails to customers stating otherwise were therefore plainly false and would mislead any reader about the state of the company's assets.

The statement regarding the second layer of supposed protection—that the company had "purchase orders and LOI's for over $43 mm in orders"—was also misleading. As Lorenzo testified, this assurance was based on a single, non-binding, letter of intent, which did not obligate the potential purchaser (or W2E) to do anything. Lorenzo argues on appeal that W2E's CEO "believed in the validity of this LOI [and] that it would turn into customer orders." But that assertion is based on Lorenzo's own, self-serving testimony about what W2E's CEO may have believed. And even if that *is* what the CEO believed, it is still only vague speculation that the LOI *could* "turn into customer orders." Lorenzo's written statements promising the prospective investors that the company *had* over $43

million in orders was therefore false and would mislead any reader about the company's future revenue.

The third statement—that Charles Vista had agreed to raise additional money—was also misleading. As Lorenzo admitted, Charles Vista had no such agreement with W2E. Lorenzo nevertheless argues on appeal that the emails' assurance to the contrary was "not an unreasonable statement because Gregg Lorenzo had on a number of prior occasions raised money to pay back debenture holders" and because Gregg Lorenzo had been meeting with other broker-dealers about raising additional funds for W2E. But even if these claims were true, they establish only the theoretical possibility that Charles Vista could have raised additional money to repay investors, not that it had agreed to do so (as Lorenzo's emails claimed). Lorenzo also admitted that, even if Charles Vista *had* agreed to raise additional money, it would have had a difficult time doing so: Charles Vista, Lorenzo explained, did not have "the buying power or resources to properly fund Waste2Energy in order to repay the debentures." Lorenzo's assurance that Charles Vista had agreed to raise additional money was therefore false and would mislead any investor about the prospects of Charles Vista actually raising additional money in the event of W2E's default.

B. The misrepresentations in the emails were material.

We next examine whether the misrepresentations were material. For a misstatement to be material, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly

altered the 'total mix' of information made available."[18] It does not matter whether "disclosure of the omitted fact would have caused the reasonable investor to change" his behavior.[19]

That standard is met here. Lorenzo's emails concerned an unsecured debt offering by a company in dire financial straits. Yet instead of mentioning any of the substantial risks involved, Lorenzo falsely assured retail customers that their investment would be protected in three different ways.[20] A reasonable

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[18] *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

[19] *TSC Indus.*, 426 U.S. at 449.

[20] We note that, while the emails directed the customers to read the PPM (which disclosed some of the risks involved with the offering but not the company's $10 million write-down), Lorenzo never sent them the disclosure document and did not know whether they ever saw it. *Cf. New Jersey Carpenters Health Fund v. Royal Bank of Scotland*, 709 F.3d 109, 127 (2d Cir. 2013) (explaining that "'[t]here are serious limitations on a corporation's ability to charge its stockholders with knowledge of information omitted from a document such as a . . . prospectus on the basis that the information is public knowledge and otherwise available to them'"); *SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1252 (11th Cir. 2012) (rejecting defendant's motion for summary judgment on the "materiality" issue by noting that the "misstatements must be considered in the factual context of a weak, or non-existent, distribution of the written disclosures"). And while W2E previously disclosed the $10 million write-down and lack of other assets in its Forms 8-K and 10-Q, that information was more than six months old when Lorenzo sent the emails. A reasonable investor could therefore believe, as Lorenzo's emails implied, that the company's fortunes had changed in that time—a misimpression furthered by Lorenzo's other false claims

investor would have found the accuracy of any one of these promises of protection to significantly alter "the 'total mix' of information made available" given the company's precarious financial state and the offering's unsecured nature.[21] That all three statements were inaccurate—meaning that any investment had essentially no protection—made the misrepresentations all the more material to prospective investors.

C. Lorenzo acted with scienter when sending the materially misleading emails to customers.

We next turn to the question of scienter—namely, whether Lorenzo knew or must have known that his emails were materially misleading.[22] That standard is met here. Regarding the first layer of supposed protection (that the company had "over $10 mm in confirmed assets"), Lorenzo admitted knowing that W2E had written off its $10 million in intangible assets when he sent the emails. Lorenzo also acknowledged that, even before the write-off, he had considered the supposed $10 million in intangibles to be "dead assets" because there was "no way" that W2E could "get even close to $10 million" for them. Lorenzo further admitted that, for more than half a year before sending the emails, he repeatedly told Gregg Lorenzo not to sell the debentures as being collateralized by the intangible

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about the company's supposedly strong revenue stream of $43 million in purchase orders and letters of intent and Charles Vista's supposed willingness to raise additional funds.

[21] *TSC Indus.*, 426 U.S. at 449.

[22] *See supra* note 17 (defining scienter).

assets because he understood that those assets would not protect the customers' investment.

Lorenzo's testimony similarly establishes that he knew or must have known that the statement regarding the second layer of supposed protection (the alleged $43 million in purchase orders and LOIs) was both false and misleading. Lorenzo admitted that, before sending the emails, he knew that the $43 million in purported purchase orders and LOIs were based on only a single, non-binding letter of intent, which did not obligate the potential purchaser (or W2E) to do anything and that, by sometime in September, Lorenzo had "lost confidence that this 43 million was ever going to happen." He even acknowledged that, while he could not say with "a hundred percent" certainty that the statement was misleading, "I could see it being misleading."

And regarding Lorenzo's third misstatement (Charles Vista's supposed agreement to raise additional money), Lorenzo admitted that, at the time of the emails, he knew that Charles Vista had not agreed to raise any additional money to repay debenture investors. He further acknowledged that, even if such an agreement had existed, he knew, "long before October," that W2E would have had a difficult time raising additional money because Charles Vista had already invested 70 percent of all of its brokerage clients' money in W2E, an amount Lorenzo acknowledged was "way too much." Because of this, Lorenzo admitted, "Charles Vista would not have the buying power or resources to properly fund Waste2Energy in order to repay the debentures." In fact, when asked at the hearing whether his assurance

that Charles Vista would raise additional money was misleading, he admitted that "you couldn't hang your hat on it."

Despite this evidence of scienter, Lorenzo asserts on appeal that he had a good faith belief in the truthfulness of his emails and that there is no basis for concluding that he "acted with intent to deceive investors." He claims it was "entirely reasonable" to state that the company had $10 million in confirmed assets because that figure was taken from the company's unaudited financial statements, which had been filed with the Commission. Lorenzo further reasons that it was not reckless for him to have missed the company's subsequent write off because W2E allegedly "buried" that fact in its filings and failed to fulfil a contractual agreement that Lorenzo claimed the company had with Charles Vista to immediately disclose any material changes in W2E's financial condition. The write down "needed to be emphasized," Lorenzo testified, "not minimized and not hidden in a regulatory document. There [are] no disclosures anywhere, anywhere that this asset may have been written off to 95 percent. None. Zero."

These contentions are both implausible and contradicted by Lorenzo's testimony. W2E was Lorenzo's only investment banking client, and it was his job to review the company's financial statements. Lorenzo knew at the time he received the filings that W2E was in dire financial condition. He had also believed for months that the company's assets were not worth "even close to $10 million." That Lorenzo could have looked at the company's filings, which was his job, and missed what was one of the most pertinent facts in

them—the valuation of the company's assets—is either untrue or extreme recklessness.[23] But even if Lorenzo did initially miss W2E's write-down, Lorenzo admitted that he learned about it a few days later, when the company's CFO emailed him about it. In fact, when asked during his investigative testimony about whether he knew at the time he sent the emails that the statements about the three layers of protection were inaccurate and misleading, he answered, "I can't sit here and say that I didn't know."

Lorenzo also admitted during the hearing that he did not believe that W2E was a worthwhile investment; that he had "lost confidence in the management of Waste2Energy to grow the business"; and that he thought it was "highly unlikely . . . that [W2E] was going to have enough corporate growth in order to pay back the money that it had borrowed." These worries about the company's offering, combined with his long-standing concern about the legitimacy of the company's $10 million in claimed assets, establish that it was at least extremely reckless for Lorenzo to email customers

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[23] Lorenzo points to Charles Vista's chief compliance officer's sending an email to Charles Vista's brokers (which contained a research report showing that W2E's assets exceeded $10 million) as evidence that the compliance officer also missed the asset write down in W2E's financial statements and thus represented "some evidence that Mr. Lorenzo was not acting recklessly or negligently when he missed it." But there was no testimony or other evidence introduced about the circumstances surrounding the distribution of that document, and the mere fact that, for whatever unknown reason, a compliance officer sent an inaccurate research report internally to the firm's brokers is neither analogous to, nor an excuse for, Lorenzo's knowingly sending materially misleading emails to prospective investors.

that their investment would be protected by $10 million in confirmed assets without first checking that statement against the company's most recent financial statements.[24]

We also disagree with Lorenzo's claim that his forwarding the company's public filings (which contained the $10 million write down) to Charles Vista's brokers shortly after receiving them shows that he lacked the intent to misrepresent or hide W2E's financial condition. Forwarding the company's filings internally to Charles Vista employees does not explain or excuse Lorenzo's subsequent decision to send materially misleading emails externally to firm customers. And the record contains evidence of at least one possible motive for misleading potential investors: Lorenzo knew when he sent the emails that his employer, Charles Vista, would earn what he described as an "exorbitant" fee from any successful sales and that he would receive a portion of those fees.[25] Lorenzo's testimony clearly establishes that he either

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[24] *Cf. Rita J. McConville*, Exchange Act Release No. 51950, 2005 WL 1560276, at *9 n.36 (June 30, 2005) (finding violations of Section 10(b) and Rule 10b-5 because "it was at least reckless [for respondent to] not actually review the [Form 10-K] about which she was making representations"), *pet. for review denied*, 465 F.3d 780 (7th Cir. 2006).

[25] *Cf. Donald L. Koch*, Exchange Act Release No. 72179, 2014 WL 1998524, at *14 (May 16, 2014) ("[P]roof of motive is not required where there is direct evidence of manipulative intent; it is only where direct evidence of scienter is lacking that circumstantial evidence of intent, such as motive, becomes critical.").

knew or must have known that his emails would materially mislead investors.[26]

Nor are we persuaded by Lorenzo's assertion that his sending the emails was simply a "mistake." Lorenzo was well aware that the emails falsely represented crucial facts about W2E and its debenture offering. Sending emails to customers was also not a normal occurrence for Lorenzo. In fact, he contends that these emails were the only time he ever communicated with customers. His claim that he nevertheless "didn't give [sending the emails] much thought" is therefore implausible. And if Lorenzo did send the emails without "think[ing] about it one way or the other," as he claims, such a dismissive attitude toward investors' interests would be equally troubling and still constitute acting with extreme recklessness.

D. Lorenzo "made" the material misstatements in the emails.

Lorenzo argues that even if he knowingly sent the materially misleading emails to customers, he cannot

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[26] Lorenzo argues that the Division failed to introduce any expert testimony that would establish the proper standard of care for investment bankers conducting placements of debentures or that would establish that Lorenzo acted recklessly in not catching W2E's write down of its assets. But we need not rely on expert testimony when determining such legal questions. *Cf. Dearlove v. SEC*, 573 F.3d 801, 804 (D.C. Cir. 2009) (stating that "the SEC need not have received expert testimony to establish the standard of care or to determine whether Dearlove's conduct was unreasonable"); *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *17 (May 27, 2011) (stating that the Commission is not hindered by the lack of expert testimony when determining whether a securities violation has occurred).

be a primary violator of the antifraud provisions because he did not "make" the misstatements at issue. In support, Lorenzo cites the Supreme Court's decision in *Janus Capital Group v. First Derivative Traders*, which interpreted Rule 10b-5(b)'s prohibition against "mak[ing] any untrue statement of a material fact" as extending only to those with "ultimate authority" over an alleged false statement.[27] This argument is doubly flawed.

As a preliminary matter, because the language that a primary violator must "make" a misstatement appears in only Rule 10b-5(b), the Division need not establish that a defendant "made" a misstatement to establish liability under the other antifraud provisions.[28] And as to Rule 10b-5(b), we conclude that Lorenzo "made" each misstatement by exercising "ultimate authority over the statement, including its content and whether and how to communicate it."[29] Although Lorenzo's emails stated that he was summarizing several key points of the debenture offering at Gregg Lorenzo's "request," Lorenzo testified during his investigatory testimony that he did not recall ever discussing either of the emails or their subject matter with Gregg Lorenzo. Lorenzo later testified at the hearing that he "got the e-mail addresses from [Gregg Lorenzo]," but that, "[i]f memory serves me—I think I authored [the email] and then it was approved by Gregg and Mike [Molinario, Charles'

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[27] 131 S. Ct. 2296, 2302–05 (2011).

[28] *See Flannery*, 2014 WL 7145625, at *10–19.

[29] *Janus*, 131 S. Ct. at 2302.

Vista's compliance officer]." Lorenzo also put his own name and direct phone number at the end of the emails, and he sent the emails from his own account.[30] Lorenzo further testified that he understood that Gregg Lorenzo wanted the emails to come from the investment banking division (which Lorenzo oversaw) and that, by sending the emails, Lorenzo was putting his own reputation on the line.[31]

On appeal, Lorenzo disputes that he was a "maker" of the emails by asserting that he "merely helped to distribute the statements by sending the email that Gregg Lorenzo drafted." Yet there is no persuasive evidence of that. At best, Lorenzo provided conflicting and ambiguous testimony about his and Gregg Lorenzo's respective roles in the emails. For example, when asked during the hearing whether he knew it was

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[30] *Cf. City of Roseville Employees Ret. Sys. v. Energysolutions, Inc.*, 814 F. Supp. 2d 395, 417 (S.D.N.Y. 2011) (stating that there was "no dispute" that each of the defendants who had signed the misstatements had "made" the statements under *Janus*); *S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 WL 6850921, at *6 (Dec. 5, 2014) (finding that respondents had "made" the misstatements where they "drafted, dated, printed on Firm letterhead, and signed" the documents containing the misstatements).

[31] *Cf. Janus*, 131 S. Ct. at 2302 (stating that "attribution within a statement or implicit from surrounding circumstances is strong evidence" that the statement "was made by" the party to whom it was attributed); *SEC v. Greystone Holdings, Inc.*, No. 10-Civ-1302, 2012 WL 1038570, at *9 (S.D.N.Y. Mar. 28, 2012) (finding that chief operating officer was the "maker" of misstatements in certain press releases under *Janus* despite defendant's claim that the chief executive officer had ultimate authority over issuance of press releases).

misleading to tell customers that W2E had $10 million in confirmed assets, Lorenzo testified that he "just made a mistake and sent it. I cut and pasted and sent it. I made a mistake." Lorenzo later testified that, "as soon as [Gregg Lorenzo] gave me the e-mail address, I typed it into the 'to' column and cut and pasted this – the content and sent it out." Lorenzo also claimed, "My boss asked me to send these e-mails out and I sent them out." But all that this self-serving testimony establishes is that Gregg Lorenzo may have asked Lorenzo to email certain customers about the debenture offering and that he provided Lorenzo with the email addresses to do so. It does not establish that anyone other than Lorenzo was ultimately responsible for the emails' content. Nor do the emails themselves establish this. They state only that Gregg Lorenzo had requested that Lorenzo's investment banking division summarize the debenture offering, not that Gregg Lorenzo wrote or had anything else to do with the substance of that summary. To the contrary, Lorenzo testified at the hearing that he remembered authoring the emails himself. And during his earlier investigative testimony, Lorenzo testified that he did not recall ever discussing the emails or their subject matter with Gregg Lorenzo. We therefore find that Lorenzo was ultimately responsible for the emails' content and dissemination and was thus the maker of the misstatements within the meaning of Rule 10b-5(b).[32]

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[32] Although the law judge found that "Gregg Lorenzo had drafted [the emails] relating to the debenture offering to two Charles Vista clients," she did so after weighing the evidence, rather than after making a credibility determination. And even if she had made a credibility finding, we do not accept such findings "blindly." *Ofirfan Mohammed Amanat*, Exchange Act Release No. 54708, 2006 WL

E. Lorenzo's role in the misrepresentation constituted a deceptive "device," an "artifice to defraud," and a deceptive "act" in violation of Section 10(b), Rule 10b-5(a) and (c), and Section 17(a)(1).

We also find that Lorenzo employed a "device, scheme, or artifice to defraud," in violation of Section 17(a)(1) and Rule 10b-5(a); that he engaged in an "act" that would operate as a fraud in violation of Rule 10b-5(c); and that his conduct was deceptive, as required by Section 10(b). Independently of whether Lorenzo's involvement in the emails amounted to "making" the misstatements for purposes of Rule 10b-5(b), he knowingly sent materially misleading language from his own email account to prospective investors. Lorenzo's role in producing and sending the emails constituted employing a deceptive "device," "act," or "artifice to defraud" for purposes of liability under Section 10(b), Rule 10b-5(a) and (c), and Section 17(a)(1).[33]

3199181, at *8 n.46 (Nov. 3, 2006) (noting that "'there are circumstances where, in the exercise of our review function, we must disregard explicit determinations of credibility'" (quoting *Kenneth R. Ward*, Securities Act Release No. 8210, (Mar. 19, 2003) *aff'd*, 75 F. App'x 320 (5th Cir. 2003))), *pet. denied*, 269 F. App'x 217 (3d Cir. 2008); *see also supra* note 35 and accompanying text (describing our *de novo* review).

[33] *See Flannery*, 2014 WL 7145625, at *12–13 (concluding that Rule 10b-5(a) and (c) and Section 17(a)(1) encompass drafting or devising, in addition to "making," a fraudulent misstatement); *accord SEC v. Clark*, 915 F.2d 439, 448 (9th Cir. 1990) (noting that Rule 10b-5(a) and (c) "provide a broad linguistic frame within which a large number of practices may fit").

F. The Commissions' *de novo* review cures any alleged errors in the initial decision.

In his appeal, Lorenzo challenges the sufficiency of the law judge's findings, arguing that the law judge "simply plugged in the facts from Lorenzo's case into [an] earlier [initial decision, *Gualario & Co., LLC*],[34] when they just don't fit." Among other things, Lorenzo contends that the law judge failed to specify which of the three statements at issue in the present case were false, why they were false, or the basis for finding that Lorenzo acted with scienter. Lorenzo similarly claims that the law judge reached her sanctions determinations by "essentially cut[ting] and pasting the facts of Lorenzo's case into the earlier decision," when, according to Lorenzo, "the acts committed [in *Gualario*] were much more severe and completely dissimilar to the facts in this case." Lorenzo contends that, because the law judge did not make adequate findings, "there is no way the Commission can perform an adequate review of its findings." We disagree. Any alleged deficiencies in the law judge's analysis are of no consequence because our review is *de novo*; the violations we find and the sanctions we impose are based on our own independent review of the record.[35] In particular, we find that notwithstanding differences

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[34] Initial Decision Release No. 452, 2012 WL 627198 (Feb. 14, 2012).

[35] *See* Rule of Practice 411(a), 17 C.F.R. § 201.411(a) ("The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record.").

between the facts in this case and those in *Gualario*, the record evidence of Lorenzo's own, unique misconduct and the risks he poses to investors establishes both the violations we find and the propriety of the sanctions we impose for all the reasons described herein.

IV.

The law judge imposed the following sanctions against Lorenzo: (i) a bar from associating with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization companies and from participating in an offering of penny stock; (ii) an order to cease and desist from committing or causing any violations or future violations of Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5; and (iii) and a third-tier civil penalty of $15,000. We find that these sanctions are appropriate and necessary to protect the investing public.

A. Barring Lorenzo from the industry is appropriate.

Exchange Act Section 15(b)(6) authorizes the Commission to bar a respondent from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, nationally recognized statistical rating organization, and from participating in an offering of penny stock "if that person has willfully violated any provision of the Exchange Act . . . and the bar is in the public

interest."[36] We find that these elements are met and that an industry-wide bar is appropriate.

1. Lorenzo willfully violated the securities laws.

We first find that Lorenzo's conduct was willful. It is well established that "[a] willful violation under the federal securities laws simply means 'that the person charged with the duty knows what he is doing.'"[37] It is sufficient that the actor "intentionally" or "voluntarily" committed the act that constitutes the violation; he need not also be aware that he is violating one of the securities laws or rules promulgated thereunder.[38] Lorenzo claims that he did not give "much thought" to sending the emails, but there is no dispute that Lorenzo intentionally sent them.

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[36] 15 U.S.C. § 78o(b).

[37] *Johnny Clifton*, Exchange Act Release No. 69982, 2013 WL 3487076, at *11 n.75 (July 12, 2013) (quoting *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000)).

[38] *Wonsover*, 205 F.3d at 414; *accord Mathis v. SEC*, 671 F.3d 210, 217 (2d Cir. 2012) (stating that willfulness "means intentionally committing the act which constitutes the violation [and that there] is no requirement that the actor also be aware that he is violating one of the Rules or Acts"); *Jason A. Craig*, Exchange Act Release No. 59137, 2008 WL 5328784, at *4 (Dec. 22, 2008) (stating that a willful violations of the securities laws requires that we "need to find only that [the respondent] voluntarily committed the acts that constituted the violation, not that [the respondent] was aware of the rule he violated or that he acted with a culpable state of mind").

2. An industry-wide bar is in the public interest.

We assess whether a bar is in the public interest by considering the egregiousness of Lorenzo's conduct, the isolated or recurrent nature of the infraction, the degree of scienter involved, Lorenzo's recognition of the wrongful nature of his conduct, the sincerity of any assurances against future violations, and the likelihood that Lorenzo's occupation will present opportunities for future violations.[39] Our inquiry into these factors "is a flexible one, and no one factor is dispositive."[40] Here, these considerations weigh in favor of barring Lorenzo from the industry.

Lorenzo's conduct was egregious. A fundamental purpose of the securities laws is "to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry."[41] Because of this, "[t]he proper functioning of the securities industry and markets depends on the integrity of industry participants and their commitment to transparent

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[39] *Ronald S. Bloomfield*, Exchange Act Release No. 71632, 2014 WL 768828, at *18 (Feb. 27, 2014); *accord Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

[40] *Disraeli*, 2007 WL 4481515, at *15 (quoting *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *4 (Sept. 26, 2007), *pet. for review denied*, 548 F.3d 129 (D.C. Cir. 2008)), *pet. for review denied*, 334 F. App'x 334 (D.C. Cir. 2009).

[41] *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963).

disclosure."[42] Lorenzo demonstrated a complete disregard for these principles by grossly misleading, if not outright lying to, retail customers about the significant risks involved in purchasing W2E's debentures. We have repeatedly warned that such violations of the antifraud provisions are "'especially serious and subject to the severest of sanctions under the securities laws.'"[43]

Lorenzo has also displayed troubling dishonesty. He sent his two misleading emails separately, to different customers, thus presenting separate opportunities to mislead prospective investors. And while Lorenzo seeks credit for voluntarily testifying to Commission staff during its investigation, his testimony painted a notably misleading picture of his employer and W2E's offering. For example, while Lorenzo initially described Gregg Lorenzo to Commission staff as an "honest guy," he later admitted at the hearing that "there [wa]s no way on God's green earth I thought Gregg Lorenzo was an honest guy." Lorenzo similarly described W2E's debt offering as a high quality project during the investigation but later admitted that he thought the offering was "a toxic convertible debt spiral."

Lorenzo also acted with a high degree of scienter. Lorenzo knew, when he sent his emails to customers,

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[42] *Clifton*, 2013 WL 3487076, at *14 (quoting *John W. Lawton*, Advisers Act Release No. 3513, 2012 WL 6208750, at *11 (Dec. 13, 2012)).

[43] *Peter Siris*, Exchange Act Release No. 71068, 2013 WL 6528874, at *6 (Dec. 12, 2013) (quoting *Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 WL 1377357, at *4 (Apr. 20, 2012)), *pet. for review denied*, 773 F.3d 89 (D.C. Cir. 2014).

that he was misstating critical facts about W2E and the safety of its debenture offering.[44] That Lorenzo so blatantly ignored the importance of communicating truthfully with potential investors creates a significant risk that he will engage in similar misconduct in the future and demonstrates his unfitness to participate in the securities industry.[45]

Lorenzo's unwillingness to accept responsibility for this misconduct further weighs in favor of a bar. Although he claims to have "apologized many times for his limited involvement with the W2E debentures" and to "regret[] the emails being sent out," he continues to blame W2E and Gregg Lorenzo for his actions. Lorenzo claims, for instance, that W2E failed to inform him properly of the $10 million write-down and that he sent the emails at Gregg Lorenzo's direction. But none of these supposed failures by others explains, or excuses,

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[44] *Cf. Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *3 (Feb. 4, 2008) (stating that respondent's conduct "evince[d] a high degree of scienter" because "he knew [the private placement memorandum]'s representations with respect to the use of proceeds were misleading"), *pet. for review denied*, 561 F.3d 548 (6th Cir. 2009).

[45] *Cf. Tzemach David Netzer Korem*, Exchange Act Release No. 70044, 2013 WL 3864511, at *7 (July 26, 2013) (finding that "the deliberate manner in which Korem flouted [a core] responsibility suggests that he is likely to engage in future misconduct"); *Lawton*, 2012 WL 6208750, at *9 (considering past conduct as evidence in a "broader inquiry into whether a person presents a future risk to the public interest because, as the Supreme Court has recognized, the 'degree of intentional wrongdoing evident in a defendant's past conduct' is an important indication of the defendant's propensity to subject the trading public to future harm" (quoting *Aaron v. SEC*, 446 U.S. 680, 701 (1980))).

Lorenzo's decision to send retail customers emails that he knew contained materially misleading statements. Such a refusal to accept responsibility "has long been deemed an appropriate measure of fitness for association in the industry."[46]

We are particularly troubled by Lorenzo's continued attempts to shift blame onto W2E for not disclosing the company's write down more fully. Lorenzo criticized W2E's supposed lack of disclosure by testifying that the company's $10 million write-down "deserved a Sermon on the Mount meeting" and "needed to be emphasized, emphasized, not minimized and not hidden in a regulatory document." Yet when discussing his own failure to disclose the same write-down to investors, Lorenzo dismissed his conduct as an "unintentional miscue" and his involvement as "limited." Although a respondent has the right to present a vigorous defense, we find that Lorenzo's continued attempts here to shift blame and minimize his role in deceiving investors demonstrate that he "does not fully understand the seriousness of his misconduct and how it violated the duties of a securities professional" and "presents a significant risk that, given th[e] opportunity, he would commit further misconduct in the future."[47]

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[46] *Gregory Bartko*, Exchange Act Release No. 71666, 2014 WL 896758, at *11 (Mar. 7, 2014) (finding that respondent's unwillingness to accept responsibility weighed in favor of a bar); *accord Seghers*, 548 F.3d at 137 (holding that imposition of a more severe sanction for refusal to accept responsibility "did not unconstitutionally burden [respondent] in the district court . . . nor did it deny him due process before the SEC").

[47] *Clifton*, 2013 WL 3487076, at *14 (citations omitted).

Nor does the lack of any demonstrated causal link between Lorenzo's emails and the customers' ultimate investment decisions weigh against a bar. The Division is not required to establish either reliance or loss by any investor.[48] Instead, "our focus is on the welfare of investors generally and the threat one poses to investors and the markets in the future."[49] And that is particularly true here, as Lorenzo's emails created a substantial risk to investors by misleading them about the likelihood of losing much, if not all, of any investment.

We are also unpersuaded by Lorenzo's claim that his occupation will not present opportunities for future violations. Lorenzo contends that his communicating with retail customers "was a unique occurrence that was outside the scope of his investment banking responsibilities—both at Charles Vista and at his [subsequent] firm," but his admission that sending emails to customers was not within his normal duties heightens our concern that Lorenzo will engage in future misconduct if allowed to remain in the industry, no matter the scope of that employment. As we have repeatedly observed, "[t]he securities industry presents continual opportunities for dishonesty and abuse, and

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[48] *See, e.g.*, *Morgan Keegan & Co.*, 678 F.3d at 1244; *Graham v. SEC*, 222 F.3d 994, 1001 n.15 (D.C. Cir. 2000).

[49] *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *9 (Feb. 13, 2009) (citing *Christopher A. Lowry*, Advisers Act Release No. 2052, 55 SEC 1133, 2002 WL 1997959, at *6 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003)); *cf. Korem*, 2013 WL 3864511, at *5 (rejecting respondent's argument that his conduct was not egregious because there was no harm or loss).

depends heavily on the integrity of its participants and on investors' confidence."[50] And the antifraud provisions that Lorenzo violated apply to all securities industry participants. While we recognize the severity of a collateral bar and its obvious impact on Lorenzo's ability to continue working in the securities industry, we find, for all the reasons discussed herein, that imposing such a bar on Lorenzo from associating with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stocks is necessary to prevent Lorenzo from putting investors at further risk and will deter other market professionals from engaging in similar misconduct.[51]

Lorenzo argues that imposing such a bar is so "grossly disproportionate to the offense at issue, particularly given Mr. Lorenzo's long unblemished career in the securities industry," that it violates the Eighth Amendment's prohibition against excessive punishment. We disagree. Although some mitigating

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[50] *Seghers*, 2007 WL 2790633, at *7; *see also Koch*, 2014 WL 1998524, at *21 n.224 (citing cases).

[51] *Cf. Lawton*, 2012 WL 6208750, at *12–13 (finding that a collateral bar was justified when respondent "reveal[ed] an attitude toward regulatory oversight that is fundamentally incompatible with the principles of investor protection"; violated professional responsibilities that are "not limited to a particular aspect of the securities industry"; and demonstrated "his ongoing unfitness and risk that he would engage in further misconduct if given future opportunities in the industry," where "opportunities for similar misconduct arise in each of the associational capacities covered by the collateral bar").

factors exist, including that Lorenzo has a relatively clean disciplinary record, that he claims to have made some effort at assisting defrauded investors, and that he earned relatively little profit from his misconduct, his claims of mitigation are far outweighed by the gravity of his violations and the risk of his committing future violations.[52] Our intent in ordering that Lorenzo be barred from the industry is to protect the investing public from further harm, not to punish Lorenzo.[53] And the Exchange Act specifically authorizes us to impose such an industry-wide bar.[54] Barring him from the

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[53] *Cf. Philip J. Milligan*, Exchange Act Release No. 61790, 2010 WL 1143088, at *5 (Mar. 26, 2010) (imposing an associational bar despite a previously clean record); *Terrance Yoshikawa*, Exchange Act Release No. 53731, 2006 WL 1113518, at *8 (Apr. 26, 2006) (sustaining self-regulatory organization's imposition of a bar because, while the petitioner earned "a relatively small amount of profits," the potential harm to the markets "could be considerably greater than this dollar amount"); ***Marshall E. Melton***, Exchange Act Release No. 48228, 56 SEC 695, 2003 WL 21729839, at *7 (July 25, 2003) (finding that respondent's previously clean record did not outweigh his misconduct and imposing a bar). We also note that Lorenzo's disciplinary history is not quite unblemished, as Lorenzo claims. In June 2011, FINRA suspended Lorenzo for twelve days in all capacities for failing to timely pay outstanding FINRA hearing session fees. *See* http://brokercheck.finra.org (last visited April 28, 2015).

[54] *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005); *cf. Seghers*, 2007 WL 2790633, at *9 (stating that imposition of a bar was "not intended to punish, but 'to protect the public interest from future harm at his hands'" (quoting *Leo Glassman*, Exchange Act Release No. 11929, 46 SEC 209, 1975 WL 160418, at *2 (Dec. 16, 1975))), *pet. for review denied*, 548 F.3d 129 (D.C. Cir. 2008).

[55] *Cf. Eric J. Brown*, Exchange Act Release No. 66469, 2012 WL 625874, at *18 (Feb. 27, 2012) (observing that substantial

industry is therefore not a punishment within the meaning of the Eighth Amendment.[55]

At oral argument, Lorenzo's counsel asserted that imposing an industry-wide bar would be inconsistent with the one-year suspension that we imposed against respondents in *John P. Flannery*.[56] But the Commission has consistently held that the "appropriate sanction depends upon the facts and circumstances of each particular case and cannot be determined precisely by comparison with actions taken in other proceedings."[57] And here, although Lorenzo and the respondents in *Flannery* all had relatively clean disciplinary histories, we find that the egregiousness of Lorenzo's misstatements, the high degree of his scienter, and his continued attempts to shift blame onto others, along with the other considerations discussed above, are distinguishable from *Flannery* and warrant a bar in this case. This conclusion is consistent with our repeated holding "that conduct that violates

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deference is granted to the legislature when determining whether a penalty is excessive under the Eighth Amendment).

[55] *Cf. Charles Phillip Elliot*, Exchange Act Release No. 31202, 50 SEC 1273, 1992 WL 258850, at *4 (Sept. 17, 1992) (finding that a bar from the industry is not a punishment within the meaning of the Eighth Amendment (citing *Flemming v. Nestor*, 363 U.S. 603, 613–14 (1960))).

[56] 2014 WL 7145625, at *10.

[57] *Ronald Pellegrino*, Exchange Act Release No. 59125, 2008 WL 5328765, at *17 n.68 (Dec. 19, 2008) (quoting *Christopher J. Benz*, Exchange Act Release No. 38440, 52 SEC 1280, 1997 WL 137027, at *4 (March 26, 1997), *petition denied*, 168 F.3d 478 (3d Cir. 1988) (Table)).

the antifraud provisions of the securities laws is especially serious and subject to the severest of sanctions under the securities laws."[58]

B. Ordering Lorenzo to cease and desist from violating the antifraud provisions is in the public interest.

Securities Act Section 8A(a) and Exchange Act Section 21C(a) authorize us to issue a cease-and-desist order against any person who "has violated" those statutes or rules thereunder.[59] When determining whether such an order is appropriate, we consider public interest factors that are substantially the same as those we consider when assessing whether to impose a bar.[60] "In addition, we consider whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being

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[58] *Siris*, 2013 SEC LEXIS 3924, at *23 (imposing a full collateral bar); *see also Clifton*, 2013 WL 3487076, at *14 (same).

[59] 15 U.S.C. § 77h-1(a) (Securities Act); *id.* § 78u-3(a) (Exchange Act).

[60] *See Joseph J. Barbato*, Exchange Act Release No. 41034, 53 SEC 1259, 1999 WL 58922, at *14 n.31 (Feb. 10, 1999). For instance, we consider the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind in committing the violation, the sincerity of assurances against future violations, the respondent's recognition of the wrongful nature of the conduct, and the respondent's opportunity to commit future violations. *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 54 SEC 1135, 2001 WL 47245, at *26 (Jan. 19, 2001), *pet. for review denied*, 289 F.3d 109 (D.C. Cir. 2002).

sought."[61] This inquiry is flexible, and no single factor is dispositive.[62] "Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation."[63]

As discussed above, Lorenzo's conduct was egregious, demonstrated a pattern of dishonesty, evidenced a high degree of scienter, and presents a substantial risk of future violations.[64] Lorenzo's clear failure to appreciate his responsibilities as a securities professional outweighs the various factors Lorenzo asserts as mitigating: that his misconduct occurred approximately five years ago; that he claims to "regret[] the emails being sent out"; that, after leaving Charles Vista, he claims to have spent "a substantial amount of time and effort assisting investors who purchased W2E debentures in organizing and filing claims"; and that he claims to have given "statements to the Commission,

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[61] *KPMG Peat Marwick*, 2001 WL 47245, at *26.

[62] *Id.*

[63] *Id.* at *24 (finding that a cease-and-desist order may be imposed only where there is some risk of future violations, but that the risk "need not be very great"); *see also Schoemann v. SEC*, 398 F. App'x 603, 604 (D.C. Cir. 2010) (per curiam) (affirming the imposition of a cease-and-desist order because petitioner's conduct "constituted a violation of the [Securities] Act"), *aff'g* Securities Act Release No. 9076, 2009 WL 3413043, at *12–13 (Oct. 23, 2009) (noting that "absent evidence to the contrary, a single past violation ordinarily suffices to raise a sufficient risk of future violations").

[64] *See supra* notes 42–51 and accompanying text; *cf. Gregory O. Trautman*, Exchange Act Release No. 61167A, 2009 WL 6761741, at *21 (Dec. 15, 2009) (imposing cease-and-desist order for violations that "involved a high degree of scienter").

without retaining a lawyer, for the purpose of aiding the Commission, and particularly those who purchased W2E debentures."[65]

Moreover, although we are ordering that Lorenzo be barred from serving in the securities industry, he could still rejoin the industry in a non-registered capacity or otherwise become active in the financial markets. Our concern that Lorenzo will commit future violations, regardless of any constraints placed on his involvement in the industry, is heightened by Lorenzo's acknowledgement that he sent the emails outside the scope of his investment banking responsibilities. Ordering Lorenzo to cease and desist from violating the antifraud provisions will serve the remedial purpose of encouraging Lorenzo to take his responsibilities more seriously should he be allowed to re-enter the securities industry or should he resume acting in a capacity that does not require registration.[66]

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[65] Lorenzo testified that, after he left Charles Vista, "a lot of clients, they didn't want to speak to Gregg [Lorenzo] anymore, so he would toss them to me." At which point, Lorenzo explained, "I got to know a few of these debentures holders, about 15." He said that he told them: "'My suggestion is this, you form a group and you try and get some relief as a group from either Waste2Energy or Charles Vista.' I did this—I didn't charge him money to help. I just made the introduction."

[66] *Cf. Trautman*, 2009 WL 6761741, at *21 (finding a cease-and-desist order to be appropriate where the Commission also imposed a bar).

C. Imposing a civil penalty of $15,000 is in the public interest.

Securities Act Section 8A(g) and Exchange Act Section 21B(a) authorize us to impose civil monetary penalties for violations of those securities statutes if it is in the public interest and if, in the case of Exchange Act § 21B(a), the respondent willfully violated the Exchange Act.[67] As discussed above, Lorenzo acted willfully when committing his violations. The question is therefore whether a civil penalty is in the public interest, which we assess based on (i) whether the act or omission involved fraud or deliberate or reckless disregard of a regulatory requirement; (ii) whether the act or omission resulted in harm to others; (iii) the extent to which any person was unjustly enriched, taking into account restitution made to injured persons; (iv) whether the individual has committed previous violations; (v) the need to deter such person and others from committing violations; and (vi) such other matters as justice may require.[68]

We find that these factors weigh in favor of imposing a monetary sanction. We acknowledge Lorenzo's relative lack of disciplinary history, that the amount of his gain was relatively small ($150), and that there was no evidence that his conduct directly led to significant customer losses. But none of this

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[67] 15 U.S.C. §§ 77h-1 (providing that the Commission may impose civil penalties if it finds a violation of the Securities Act in a cease-and-desist proceeding), 78u-2 (providing that the Commission may impose civil penalties for any violation of the federal securities laws).

[68] *Id.* § 78u-2(c).

outweighs that Lorenzo displayed a knowing and reckless disregard for his obligations as a securities professional by sending materially misleading emails to retail customers. The need to deter Lorenzo from committing such deliberately fraudulent conduct in the future warrants imposition of a monetary sanction.

As for the amount of that sanction, the securities laws authorize us to impose first-tier penalties of up to $6,500 for each "act or omission"; second-tier penalties of up to $65,000 for each act or omission that "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement"; and third-tier penalties of up to $130,000 for each act or omission that "resulted in substantial losses," created "a significant risk of substantial losses to other persons," or resulted in "substantial pecuniary gain to the person who committed the act or omission."[69]

Here, we find that Lorenzo committed two "acts or omissions" in violation of the securities laws by sending two different customers a materially misleading email.[70] While the emails he sent were largely the same and sent close in time, they were not identical and provided Lorenzo two separate opportunities to mislead customers. As for the appropriate sanction for each act or omission, we find that a third-tier penalty is appropriate because Lorenzo's violations involved

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[69] *Id.* §§ 77h-1(g)(2), 78u-2(b); *see also* 17 C.F.R. § 201.1003 (setting forth the maximum penalty amounts for violations occurring from February 15, 2005 to March 3, 2009).

[70] *Cf. SEC v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 288 n.7 (2d Cir. 2013) (finding no error in a district court counting each late trade as a separate violation).

"fraud, deceit, [and] deliberate or reckless disregard of a regulatory requirement," while also creating "a significant risk of substantial losses" to the customers.[71] Specifically, Lorenzo hid the fact that W2E was in dire financial straits and that the customers were unlikely to recoup much, if any, of their investment in the event of default. This deceit created a significant risk that recipients of the emails would lose all of whatever they decided to invest. That the customers were ultimately unable, or unwilling, to invest more than $15,000 does not negate the possibility that Lorenzo's misleading emails could have resulted in far larger investments (and subsequent losses). After all, Lorenzo was seeking to raise $15,000,000 for W2E. Such a risk of substantial loss warrants imposition of the highest tier penalty, regardless of whether either customer actually read or relied on Lorenzo's emails when making their investment decision.[72]

We nevertheless recognize Lorenzo's relative lack of profit, the lack of evidence that the emails harmed others, and Lorenzo's relatively clean disciplinary record. While we do not believe these mitigating factors outweigh the need to protect investors from future harm by barring him from the industry, we nevertheless decline to grant the Division's request to impose a $100,000 civil penalty. We instead find that a

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[71] 15 U.S.C. §§ 77h-1(g)(2), 78u-2(b).

[72] *Cf. Clifton*, 2013 WL 3487076, at *16 (imposing a maximum third tier penalty where the respondent had sought to raise more than $1 million, but where the record contained no evidence regarding actual losses nor substantial pecuniary gains).

third-tier penalty of $7,500 for each of Lorenzo's emails (for an aggregate of $15,000) is in the public interest to deter Lorenzo and others in similar positions from committing future violations.

An appropriate order will issue.[73]

By the Commission (Chair WHITE and Commissioners AGUILAR and STEIN; Commissioners GALLAGHER and PIWOWAR concurring in part and dissenting with respect to the bars from association with municipal advisors and nationally recognized statistical rating organizations).

Brent J. Fields
Secretary

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[73] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9762 / April 29, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 74836 / April 29, 2015

Admin. Proc. File No. 3-15211

[Filed XXX]

In the Matter of	)
	)
FRANCIS V. LORENZO	)
c/o Robert G. Heim	)
Meyers & Heim LLP	)
444 Madison Ave., 30th Floor	)
New York, NY 10022	)
	)

ORDER SUSTAINING DISCIPLINARY ACTION

On the basis of the Commission's opinion issued this day, it is

ORDERED that Francis V. Lorenzo be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stocks; and it is further

ORDERED that Francis V. Lorenzo cease and desist from committing or causing any violations or future violations of Section 17(a)(1) of the Securities Act of

1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; and it is further

ORDERED that Francis V. Lorenzo pay a civil money penalty in the amount of $15,000.

Payment of the civil money penalty shall be: (i) made by U.S. postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, 100 F. Street NE, Mail Stop 6042, Washington, DC 20549; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding. A copy of the cover letter and check shall be sent to Alex Janghorbani and Jack Kaufman, Division of Enforcement, U.S. Securities and Exchange Commission, New York Regional Office, Brookfield Place, 200 Vesey Street, Suite 400, New York, NY, 10281.

Brent J. Fields
Secretary

APPENDIX C

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FILE NO. 3-15211

[Filed December 31, 2013]

In the Matter of	)
	)
GREGG C. LORENZO,	)
FRANCIS V. LORENZO, and	)
CHARLES VISTA, LLC	)
	)

INITIAL DECISION RELEASE NO. 544
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15211

INITIAL DECISION AS TO FRANCIS V. LORENZO[1]

December 31, 2013

APPEARANCES:

Alex Janghorbani and Jack Kaufman for the Division of Enforcement, Securities and Exchange Commission

Robert J. Hantman of Hantman & Associates for Respondent Francis V. Lorenzo

BEFORE:

Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision (ID) concludes that Respondent Francis V. Lorenzo (Frank Lorenzo or Respondent) violated the antifraud provisions of the federal securities laws when he sent two potential investors emails containing false and misleading information about his firm's client. The ID orders him to cease and

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[1] The proceeding has ended as to Respondents Gregg C. Lorenzo and Charles Vista, LLC, who settled the charges against them. Gregg C. Lorenzo, Securities Act Release No. 9480, 2013 WL 6087352 (Nov. 20, 2013) (Settlement Order). The Settlement Order made various findings, including findings that Francis V. Lorenzo (Frank Lorenzo) engaged in various conduct, including conduct concerning which there was no evidence at Frank Lorenzo's hearing on September 18-19, 2013. It must be stressed that the only basis on which the undersigned or the Securities and Exchange Commission may evaluate Frank Lorenzo's conduct in this proceeding is the evidence adduced at his September 18-19, 2013, hearing.

desist from violations of the antifraud provisions, bars him from the securities industry, and orders him to pay a civil money penalty of $15,000.

I. INTRODUCTION

A. Procedural Background

The Commission instituted this proceeding with an Order Instituting Proceedings (OIP) on February 15, 2013, pursuant to Section 8A of the Securities Act of 1933 (Securities Act) and Sections 15(b), 21B, and 21C of the Securities Exchange Act of 1934 (Exchange Act). The undersigned held a two-day hearing in New York City on September 18-19, 2013. Three witnesses testified, including Frank Lorenzo, and numerous exhibits were admitted into evidence.[2]

The findings and conclusions in this ID are based on the record. Preponderance of the evidence was applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981). Pursuant to the Administrative Procedure Act, 5 U.S.C. § 557(c), the parties' Proposed Findings of Fact and Conclusions of Law[3] were considered. All arguments and proposed findings and conclusions that are inconsistent with this ID were considered and rejected.

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[2] Citations to the transcript will be noted as "Tr. __." Citations to exhibits offered by the Division of Enforcement (Division) and by Respondent will be noted as "Div. Ex. __" and "Resp. Ex. __," respectively.

[3] Reference to the Division's and Respondent's Proposed Findings of Fact and Conclusions of Law will be noted as "Div. Br." and "Resp. Br.," respectively.

B. Allegations and Arguments of the Parties

This proceeding concerns Frank Lorenzo's dealings with customers of Charles Vista, LLC (Charles Vista), a registered broker-dealer owned by Gregg C. Lorenzo (Gregg Lorenzo), during the fall of 2009. The OIP alleges that Lorenzo sent at least two Charles Vista customers emails containing false and misleading statements concerning the assets and business of Waste2Energy Holdings, Inc. (W2E), a start-up waste management company for which Charles Vista was attempting to sell convertible debentures.

The Division of Enforcement (Division) is seeking a cease-and-desist order, a third-tier civil money penalty, and a bar. Respondent argues that the charges are unproven and no sanctions should be imposed.

II. FINDINGS OF FACT

As discussed below, on October 14, 2009, Frank Lorenzo sent two potential investors emails that contained false and misleading information about W2E.

A. Relevant Individuals and Entities

1. Charles Vista, Gregg Lorenzo, and Frank Lorenzo

Charles Vista was a registered broker-dealer that Gregg Lorenzo owned and operated since 2009.[4] Tr.

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[4] According to Financial Industry Regulatory Authority, Inc. (FINRA), records, Charles Vista withdrew its registration as a broker-dealer on June 17, 2013. Additionally, FINRA cancelled Charles Vista's membership on July 31, 2013, for failure to pay outstanding fees. See http://brokercheck.finra.org (last visited

291; Div. Ex. 132 at 13. Charles Vista and Gregg Lorenzo have settled the charges against them in this proceeding. See Gregg C. Lorenzo, Securities Act Release No. 9480 (Nov. 20, 2013), 2013 WL 6087352 (Settlement Order). According to the Settlement Order, Gregg Lorenzo engaged in numerous fraudulent activities in connection with the business of Charles Vista. His previous ten years as a registered representative, associated with various broker-dealers, were studded with disciplinary issues.[5]

Frank Lorenzo has worked in the securities industry for over twenty-five years. Tr. 185-90; Div. Ex. 25; Resp. Ex. 1 at 4-5. In 2007, he joined Mercer Capital, Ltd. (Mercer Capital), where he was the firm's investment banker.[6] Tr. 187-89; Div. Ex. 25; Resp. Ex. 1 at 4-5. There, he met Gregg Lorenzo. Tr. 304-05; Div. Ex. 132 at 11-13. Frank Lorenzo and Gregg Lorenzo are not related. Tr. 305. Frank Lorenzo followed Gregg Lorenzo to John Thomas Financial, Inc.,

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Dec. 3, 2013). Official notice, pursuant to 17 C.F.R. § 201.323, is taken of these records. See Joseph S. Amundsen, Exchange Act Release No. 69406 (Apr. 18, 2013), 2013 SEC Lexis 1148, at *2 n. 1.

[5] According to FINRA records, FINRA permanently barred Gregg Lorenzo from association with any member, effective November 14, 2013, for his refusal to comply with multiple requests to appear for an on-the-record interview; the records also indicate an extensive state disciplinary record, including by the states of Idaho, Iowa, and Montana. See http://brokercheck.finra.org (last visited Dec. 3, 2013).

[6] According to FINRA records, Mercer Capital, Ltd, terminated or withdrew its membership as of January 15, 2010. See http://brokercheck.finra.org (last visited Dec. 3, 2013).

and then, when he found that firm too stressful, to Charles Vista, in February 2009. Tr. 181, 189-90; Div. Ex. 25 at 1; Resp. Ex. 1 at 4-5.

At Charles Vista, Frank Lorenzo was the director of investment banking. Tr. 66, 89, 181, 403; Div. Ex. 25 at 1. By the summer of 2009, Frank Lorenzo knew that Charles Vista was a "boiler room," as his assistant told him that the firm's brokers were engaged in high-pressure sales and stretching the truth to clients, and by the fall of 2009, he doubted the prudence of how Charles Vista handled clients' money. Tr. 229-30, 291-92, 299-302, 323-24, 383, 404-05. He left Charles Vista in February 2010, and has continued to work in the securities industry, currently at Hunter Wise Securities, LLC, a registered broker-dealer. Tr. 181, 311; Div. Ex. 25 at 1; Resp. Ex. 1 at 4. During the time he worked at Charles Vista, Frank Lorenzo was paid about $120,000 but incurred expenses of $60,000 to $80,000 for which he was promised, but did not receive, reimbursement. Tr. 297-98. Except for the events at issue, Frank Lorenzo has had no disciplinary issues as a registered representative. Tr. 336-37.

2. Waste2Energy Holdings, Inc. (W2E)

W2E is central to the events at issue. Tr. passim; Div. Exs. passim. W2E was a renewable energy company, founded in 2007 and made public in early 2009, which engaged Charles Vista for investment banking support. Tr. 42, 66, 77-78, 141; Div. Ex. 3 at 3. In September 2009, W2E was preparing to offer up to $15 million in 12% convertible debentures, and Charles Vista was the placement agent for this offering. Tr. 85-89; Div. Ex. 1 at page 19 of 112; Div. Ex. 3. As placement agent for the offering, Charles Vista was

positioned to earn substantial fees, including a 10% commission on sales of the debentures. See Div. Ex. 3 at iii.

W2E was in terrible financial shape during Frank Lorenzo's time at Charles Vista. Tr. 198-99. W2E's technology – aimed at converting solid waste into electricity – did not work. Tr. 42, 190, 199; see Div. Ex. 3 at 3, 21-22 (describing what the company does). W2E was placed into bankruptcy in 2012. Tr. 96, 139-40, 387; Div. Ex. 53 at 3-4.

Part of Frank Lorenzo's job as Charles Vista's head of investment banking was to conduct due diligence of investment banking clients, such as W2E, which included reviewing their filings with the Commission. Tr. 182-83, 197-98, 231-32. As Charles Vista's investment banker, Frank Lorenzo was responsible for overseeing the W2E relationship, and he was W2E's primary point of contact at Charles Vista. Tr. 65-66, 95, 155, 327-28. Indeed, the majority of Frank Lorenzo's responsibilities at Charles Vista related to W2E. Tr. 197.

B. W2E Asset Write-Off

On June 3, 2009, W2E filed a Form 8-K that contained unaudited financial statements as of December 31, 2008; the balance sheet listed about $14 million in total assets, which included about $10 million in "intangibles," and about $470,000 in "goodwill." Tr. 57, 201; Div. Ex. 15[7] at page 63 of 175. The intangibles figure referred to the valuation assigned to the company's intellectual property

[7] W2E was previously known as Maven Media Holdings. Tr. 54-55.

(essentially the technology to turn waste into energy), and the goodwill figure referred to the valuation assigned to the company's workforce. Tr. 56-57. Frank Lorenzo reviewed this Form 8-K in June 2009. Tr. 121.

W2E filed an amended Form 8-K (8-K/A) on October 1, 2009, with audited March 31, 2009, fiscal year-end financial statements. Tr. 58, 227; Div. Ex. 16. The balance sheet for the year ended March 31, 2009, reported no intangibles; following months of auditing work by W2E's independent accountants, the company had written the intangibles down to zero. Tr. 59-60, 69; Div. Ex. 16 at pages 46, 69 of 137. W2E also had written down the value of the goodwill to zero. Tr. 60, 70. With these substantial supposed assets entirely written down, the Form 8-K/A ultimately reflected under $370,600 in audited total assets for the year ended March 31, 2009 – i.e., under 3% of the total assets reflected in the December 31, 2008, balance sheet. Compare Div. Ex. 16 at page 69 of 137 with Div. Ex. 15 at page 63 of 175.

Also on October 1, 2009, W2E filed a Form 10-Q. Tr. 58, 67; Div. Ex. 22. This Form 10-Q, for the quarterly period ended June 30, 2009, again did not list any intangibles, and listed audited total assets under $370,600 for the year ended March 31, 2009. Div. Ex. 22 at page 4 of 45. It further listed audited total liabilities of over $6.6 million for the year ended March 31, 2009. Id.

On October 1, 2009, Frank Lorenzo reviewed both the Form 8-K/A and the Form 10-Q filed on that day. Tr. 231, 241; Div. Ex. 32. Indeed, he shared the filings with all brokers at Charles Vista early on October 2. Tr. 233, 243; Div. Ex. 21. October 2009, however, was

not the first time Frank Lorenzo had heard about the write-off of the majority of W2E's claimed assets; he had known about the write-off at least since the prior month. Tr. 116, 144, 154-55, 220-21; Div. Ex. 18. Furthermore, prior to October 2009, Frank Lorenzo had speculated that the intangibles were not in fact worth close to the $10 million W2E has previously claimed. Tr. 268. Frank Lorenzo believed that the amount written off was material, and thought the fact of the write-off was a "big deal." Tr. 216-17, 231, 243-44.

Following his receipt of the Forms 8-K/A and 10-Q, and prior to October 14, 2009, Frank Lorenzo was involved in a discussion between Charles Vista and W2E regarding the asset write-off. Tr. 74-77, 122-23, 249-51; Div. Exs. 19, 42.

C. The Two Emails

On October 14, 2009, Gregg Lorenzo asked Frank Lorenzo to send an email that Gregg Lorenzo had drafted relating to the debenture offering to two Charles Vista clients – William Rothe (Rothe) and Vishal Goolcharan (Goolcharan) – saying that he wanted the emails to come from Charles Vista's investment banking division. Tr. 173, 257-59, 264, 343-44, 346, 381-82; Div. Ex. 49. Frank Lorenzo heeded Gregg Lorenzo's instruction without question, sending an almost identical email to each client on that day.[8]

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[8] The email to Goolcharan states that it was sent at the request of Adam Spero and Gregg Lorenzo, while the email to Rothe states that it was sent at the request of Gregg Lorenzo.

Tr. 176-77, 257-58, 341, 346, 378, 381-82, 403-04; Div. Ex. 34. The email read in full:

> Dear Sir:
>
> At the request of Adam Spero and Gregg Lorenzo, the Investment Banking division of Charles Vista has summarized several key points of the Waste2Energy Holdings, Inc. Debenture Offering.
>
> *** Please read the Offering Memorandum, including all "Risk Factors" ***
>
> 12- month Note, Debenture pays a 12% interest rate, paid quarterly
>
> A sinking fund has been created, handled by 3rd party (SRFF attorney). Interest payment amount will be held in the sinking fund
>
> This is senior debt. There is no other debt (other than simple debt). These debenture holders have to approve (51%) any other debt.
>
> If there is a liquidation, these debenture holders get paid first.
>
> <u>There are 3 layers of protection:</u>
>
> > <u>(I) The Company has over $10 mm in confirmed assets</u>
> > <u>(II) The Company has purchase orders and LOI's for over $43 mm in orders</u>
> > <u>(III) Charles Vista has agreed to raise additional monies to repay these Debenture holders (if necessary)</u>

Debenture Holders have the option to convert their debt at $1.00 into common stock. These shares would have been already added to the Registration Statement.

Debenture Holders will receive a 3-year warrant to purchase shares of the company's stock at $2.00 per share. Debenture Holders will receive this warrant regardless if they convert or not.

Please call with any questions-

Truly,

Francis V. Lorenzo
Vice President - Investment Banking
Charles Vista, LLC.
100 William Street
18th Floor, Suite 1820
New York, NY 10038
Direct: 646.422.3113
Toll Free: 800.799.9070
Main: 212.690.6000
Fax: 212.690.6000
...@charlesvista.com

Div. Ex. 34 (emphasis added). While Frank Lorenzo knew the truth about W2E's parlous financial condition, the emails contained extensive false information, including regarding the company's "three layers of protection." Tr. 269, 283-90, 324-25. Frank Lorenzo does not take personal responsibility for having sent false information to potential investors. Rather, he blames both Gregg Lorenzo for having asked him to send the emails, Tr. 261; Div. Ex. 132 at 141, and W2E, for (as Frank Lorenzo contends) having not sufficiently brought the information about the asset

write-off to his attention, Tr. 231, 246-48, 365. Rothe never invested in the debentures,[9] but Goolcharan did, in the amount of $15,000. Tr. 93-94, 177-78, 260; Div. Ex. 54. Lorenzo earned $150 on Goolcharan's investment. Tr. 412.

Frank Lorenzo sent the emails without even thinking about the contents: "I just didn't give it much thought at the time. My boss asked me to send these e-mails out and I sent them out." Tr. 347. "The guy owns the firm. He just asked me to send out an e-mail for him. I am going to tell him no?" Tr. 382. "I didn't really think about it one way or another. Unfortunately, I hit the send button and it's caused me a lot of grief." Tr. 366. The emails were "erased from my memory two seconds after I sent [them]." Id. Frank Lorenzo characterized his actions as a "mistake" numerous times in his testimony. Tr. 260, 264, 269, 294, 298, 365-67, 370-73.

D. Ability to Pay

At the hearing and in his Proposed Findings of Fact and Conclusions of Law, Frank Lorenzo suggested that he is somewhat impecunious. Tr. 297-98, 354, 385, 401; Resp. Br. at 1 n.1, 6-7. However, he has not otherwise affirmatively asserted an inability to pay a civil money penalty. Nor has he introduced evidence such as financial statements to support such an assertion. Accordingly, Frank Lorenzo has not demonstrated an inability to pay any penalty that may be ordered in this proceeding.

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[9] Rothe, however, read Frank Lorenzo's email. Tr. 177-78.

III. CONCLUSIONS OF LAW

The OIP charges that Frank Lorenzo willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. As discussed below, it is concluded that he willfully violated those provisions.

A. Antifraud Provisions

Frank Lorenzo is charged with willfully violating the antifraud provisions of the Securities and Exchange Acts – Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder – which prohibit essentially the same type of conduct. United States v. Naftalin, 441 U.S. 768, 773 n.4, 778 (1979); SEC v. Pimco Advisors Fund Mgmt. LLC, 341 F. Supp. 2d 454, 469 (S.D.N.Y. 2004).

Section 17(a) of the Securities Act makes it unlawful "in the offer or sale of" securities, by jurisdictional means, to:

> 1) employ any device, scheme, or artifice to defraud;
>
> 2) obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary to make the statement made not misleading; or
>
> 3) engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Similar proscriptions are contained in Exchange Act Section 10(b) and Rule 10b-5.

Scienter is required to establish violations of Securities Act Section 17(a)(1) and Exchange Act Section 10(b) and Rule 10b-5. Aaron v. SEC, 446 U.S. 680, 690-91, 695-97 (1980); SEC v. Steadman, 967 F.2d 636, 641 & n.3 (D.C. Cir. 1992). It is "a mental state embracing intent to deceive, manipulate, or defraud." Aaron, 446 U.S. at 686 n.5; Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 & n.12 (1976); SEC v. Steadman, 967 F.2d at 641. Recklessness can satisfy the scienter requirement. See David Disner, 52 S.E.C. 1217, 1222 & n.20 (1997); SEC v. Steadman, 967 F.2d at 641-42; Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990). Reckless conduct is "conduct which is 'highly unreasonable' and represents 'an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" Rolf v. Blyth, Eastman Dillon & Co., Inc., 570 F.2d 38, 47 (2d Cir. 1978) (quoting Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977)).

Scienter is not required to establish a violation of Securities Act Section 17(a)(2) or 17(a)(3); a showing of negligence is adequate. See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963); SEC v. Steadman, 967 F.2d at 643 & n.5; Steadman v. SEC, 603 F.2d 1126, 1132-34 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

Material misrepresentations and omissions violate Securities Act Section 17(a) and Exchange Act Section 10(b) and Rule 10b-5. The standard of materiality is whether or not a reasonable investor or prospective investor would have considered the information

important in deciding whether or not to invest. See Basic Inc. v. Levinson, 485 U.S. 224, 231-32, 240 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); SEC v. Steadman, 967 F.2d at 643.

1. Willfulness

In addition to requesting a cease-and-desist order pursuant to Sections 8A of the Securities Act and 21C(a) of the Exchange Act, the Division requests sanctions pursuant to Sections 15(b) and 21B of the Exchange Act. Willful violations by Respondent must be found in order to impose sanctions on them pursuant to those provisions. A finding of willfulness does not require an intent to violate, but merely an intent to do the act which constitutes a violation. See Wonsover v. SEC, 205 F.3d 408, 413-15 (D.C. Cir. 2000); Steadman v. SEC, 603 F.2d at 1135; Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

2. Selective Prosecution

Frank Lorenzo suggests that charging him and not other Charles Vista staffers constitutes selective prosecution. "Selective prosecution," however, is a term of art. "To establish such a claim, a petitioner must demonstrate that he was unfairly singled out for prosecution based on improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right." Scott Epstein, Exchange Act Release No. 59328 (Jan. 30, 2009), 95 SEC Docket 13833, 13856; accord Robert Radano, Advisers Act Release No. 2750 (June 30, 2008), 93 SEC Docket 7495, 7510 n.74. No such showing was made here. Rather, the Division's decision to charge Frank

Lorenzo and not to charge other individuals was an exercise of prosecutorial discretion. Robert Radano, 93 SEC Docket at 7510 n.74. (citing Dolphin and Bradbury, Inc., Exchange Act Release No. 54143 (July 13, 2006), 88 SEC Docket 1298, 1318, aff'd, 512 F.3d 634 (D.C. Cir. 2008)).

B. Antifraud Violations

The record shows that Frank Lorenzo violated the antifraud provisions by making material misstatements and omissions in the emails. The falsity of the representations in the emails is staggering. The only possible issue is the degree of Frank Lorenzo's culpability. While denying that he intended to defraud, he admits that he was negligent, which as a threshold shows a violation of Securities Act Sections 17(a)(2) and (3). Further, the evidence shows that he was reckless – although he knew that W2E was in terrible financial shape, he sent the emails without thinking. Had he taken a minute to read the text, he would have realized that it was false and misleading and that W2E was not worth anything near what was being represented to potential investors. Also, he cannot escape liability by claiming that Gregg Lorenzo ordered him to send the emails. The fact that Gregg Lorenzo contributed to the misrepresentation does not relieve Frank Lorenzo from responsibility. See James J. Pasztor, 54 S.E.C. 398, 406-07, 411-13 (1999) (supervisor held liable for registered representative's execution of violative directed trades; supervisor had tried to stop the trading but was overruled by broker-dealer's owner who was friendly with the customer); Charles K. Seavey, 56 S.E.C. 357, 364-65, 368 (2003) (associated person found liable where investment adviser required him to sign

materially misleading letter), aff'd, 111 F. App'x. 911 (9th Cir. 2004).

In sum, it is concluded that Frank Lorenzo willfully violated the antifraud provisions of the Securities and Exchange Acts by his material misrepresentations and omissions concerning W2E in the emails.

IV. SANCTIONS

The Division requests a cease-and-desist order, a third-tier civil money penalty, and an industry bar.[10] As discussed below, Frank Lorenzo will be ordered to cease and desist from violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, ordered to pay a third-tier civil penalty of $15,000, and barred from the securities industry.[11]

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[10] The Division does not seek disgorgement. Div. Br. at 26 n.5.

[11] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), which became effective on July 22, 2010, provided collateral bars in each of the several statutes regulating different aspects of the securities industry. Frank Lorenzo's wrongdoing occurred before July 22, 2010. However, the Commission has determined that sanctioning a respondent with a collateral bar for pre-Dodd-Frank wrongdoing is not impermissibly retroactive, but rather provides prospective relief from harm to investors and the markets. John W. Lawton, Advisers Act Release No. 3513 (Dec. 13, 2012), 105 SEC Docket 61722, 61737; see also Alfred Clay Ludlum, III, Advisers Act Release No. 3628 (July 11, 2013), 2013 WL 3479060, at *1, 6; Johnny Clifton, Securities Act Release No. 9417 (July 12, 2013), 2013 WL 3487076, at *1, 13; Tzemach David Netzer Korem, Exchange Act Release No. 70044 (July 26, 2013), 2013 WL 3864511, at *1, 7.

A. Sanction Considerations

In determining sanctions, the Commission considers such factors as:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman, 603 F.2d at 1140 (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, 56 S.E.C. 695, 698 (2003). Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. Schield Mgmt. Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 & n.46. As the Commission has often emphasized, the public interest determination extends to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, 55 S.E.C. 1133, 1145 (2002), aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975). The amount of a sanction depends on the facts of each case and the value of the sanction in preventing a recurrence. See Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963); Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

B. Sanctions

1. Cease and Desist

Securities Act Section 8A and Exchange Act Section 21C(a) authorize the Commission to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" any provision of those Acts or rules thereunder. Whether there is a reasonable likelihood of such violations in the future must be considered. KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1185 (2001). Such a showing is "significantly less than that required for an injunction." Id. at 1183-91. In determining whether a cease-and-desist order is appropriate, the Commission considers the Steadman factors quoted above, as well as the recency of the violation, the degree of harm to investors or the marketplace, and the combination of sanctions against the respondent. See WHX Corp. v. SEC, 362 F.3d 854, 859-61 (D.C. Cir. 2004); KPMG, 54 S.E.C. at 1192.

Frank Lorenzo's conduct was egregious and repeated – he sent the violative email to two people. The conduct involved at least a reckless degree of scienter. The lack of assurances against future violations and recognition of the wrongful nature of the conduct goes beyond a vigorous defense of the charges. His attempt to displace blame onto both Gregg Lorenzo and W2E is an aggravating factor. His chosen occupation in the financial industry will present opportunities for future violations. The violations were neither recent nor remote in time, having occurred about four years ago. The evidence of record does not quantify the degree of harm to the marketplace in dollars but harm is evident from the dishonest nature

of Frank Lorenzo's misconduct. In light of these considerations, a cease-and-desist order is appropriate.

Frank Lorenzo's lack of a disciplinary history does not remove the need for sanctions. Mitchell M. Maynard, Advisers Act Release No. 2875 (May 15, 2009), 95 SEC Docket 16844, 6860 & n.39 ("[T]he absence of disciplinary history is not mitigative as securities professionals should not be rewarded for complying with securities laws.").

2. Civil Money Penalty

Section 21B of the Exchange Act authorizes the Commission to impose civil money penalties for willful violations of the Securities and Exchange Acts or rules thereunder. In considering whether a penalty is in the public interest, the Commission may consider six factors: (1) fraud; (2) harm to others; (3) unjust enrichment; (4) previous violations; (5) deterrence; and (6) such other matters as justice may require. See Section 21B(c) of the Exchange Act; New Allied Dev. Corp., 52 S.E.C. 1119, 1130 n.33 (1996); First Sec. Transfer Sys., Inc., 52 S.E.C. 392, 395-96 (1995); see also Jay Houston Meadows, 52 S.E.C. 778, 787-88 (1996), aff'd, 119 F.3d 1219 (5th Cir. 1997); Consol. Inv. Servs., Inc., 52 S.E.C. 582, 590-91 (1996).

As to Frank Lorenzo, there are no mitigating factors. He violated the antifraud provisions, so his violative actions "involved fraud [and] reckless disregard of a regulatory requirement [and] created a significant risk of substantial losses to other persons" within the meaning of Section 21B of the Exchange Act. Deterrence also requires a substantial penalty against him.

Penalties are in the public interest in this case. Penalties in addition to the other sanctions ordered are necessary for the purpose of deterrence. See Section 21B(c)(5) of the Exchange Act; H.R. Rep. No. 101-616, at 17 (1990), reprinted in 1990 U.S.C.C.A.N. 1379, 1384. The Division requests that Frank Lorenzo be ordered to pay third-tier penalties, without specifying dollar amounts or units of violation. In addition to arguing that there were no violations, Respondent argues that civil penalties are not warranted, much less third-tier penalties. A third-tier penalty, as the Division requests, is appropriate because Frank Lorenzo's violative acts involved fraud and resulted in the risk of substantial losses to other persons. See Section 21B(b)(3) of the Exchange Act. Under that provision, for each violative act or omission during the time at issue the maximum third-tier penalty is $150,000 for a natural person. 17 C.F.R. § 201.1004. The provision, like most civil penalty statutes, leaves the precise unit of violation undefined. See Colin S. Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Colum. L. Rev. 1435, 1440-41 (1979).

The events at issue will be considered as one course of action, and a third-tier penalty amount of $15,000 will be ordered against Frank Lorenzo. Combined with the other sanctions ordered, a third-tier penalty of $15,000 – less than the maximum and equivalent to the actual loss sustained by investor Goolcharan – is in the public interest.

3. Bar

The Division requests that Frank Lorenzo be barred from the securities industry. Combined with other

sanctions ordered, bars are in the public interest and appropriate deterrents. The violations involved scienter. Frank Lorenzo's business provides him with the opportunity to commit violations of the securities laws in the future. The record shows a lack of recognition of the wrongful nature of the violative conduct. His attempts to deflect blame onto others are aggravating factors. In short, it is necessary in the public interest and for the protection of investors that Frank Lorenzo be barred from the industry.

V. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), it is certified that the record includes the items set forth in the record index issued by the Secretary of the Commission on November 26, 2013, plus Frank Lorenzo's Proposed Findings of Fact and Conclusions of Law, dated November 14, 2013.

VI. ORDER

IT IS ORDERED that, pursuant to Sections 8A of the Securities Act and 21C(a) of the Exchange Act, FRANCIS V. LORENZO CEASE AND DESIST from committing or causing any violations or future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

IT IS FURTHER ORDERED that, pursuant to Section 21B of the Exchange Act, FRANCIS V. LORENZO PAY A CIVIL MONEY PENALTY of $15,000.

IT IS FURTHER ORDERED that, pursuant to Section 15(b) of the Exchange Act, FRANCIS V. LORENZO IS BARRED from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock.[12]

Payment of penalties shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission. See 17 C.F.R. § 201.601(a), (c). The payment, and a cover letter identifying the Respondent and Administrative Proceeding No. 3-15211, shall be delivered to: Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, AMZ-341, 6500 South MacArthur Blvd., Oklahoma City, Oklahoma 73169. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R.

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[12] Thus, he will be barred from acting as a promoter, finder, consultant, or agent; or otherwise engaging in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock, pursuant to Exchange Act Section 15(b)(6)(A), (C).

§ 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111(h) of the Commission's Rules of Practice, 17 C.F.R. § 201.111(h). If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Carol Fox Foelak
Administrative Law Judge